In the

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 359.

THOMAS CONNELLY AND WILLIAM E. DEE, *Plaintiffs in Error,*
vs.
UNION SEWER PIPE COMPANY, *Defendant in Error.*

In Error to the Circuit Court of the United States for the Northern District of Illinois.

# Brief and Argument of Plaintiffs in Error.


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## STATEMENT OF THE CASE.

### FORM OF ACTION.

Two suits in assumpsit brought by the Union Sewer Pipe Company, a corporation of Ohio, against Thomas Connelly and William E. Dee, citizens of the State of Illinois, to recover—from Thomas Connelly upon two promissory notes the sum of three thousand two hundred and fifty-eight dollars and sixty cents, and from William E. Dee—upon an open account, for goods sold and delivered, two thousand three hundred and eighty-nine dollars and twenty-six cents.

## Decision Based on the Pleadings.

Separate pleadings were filed by the defendant in error in the court below;—in the Thomas Connelly case, the ordinary declaration on notes payee *versus* maker, with affidavit of amount due;—in William E. Dee case the ordinary declaration in assumpsit, with common counts and affidavit of amount due.

To these pleadings the plaintiffs in error filed separate pleas of the general issue, with affidavits of merits attached, also notices of special defenses under the Practice Act of the State of Illinois, also notices and claims of set-off against defendant in error, supported by bills of particulars of the nature and amount of the set-offs claimed.

The defenses were based upon the theory that the defendant in error was a pool, trust and combination organized for the express purpose of creating and carrying out restrictions in trade and commerce contrary—

1. To the common law in force both in Ohio and Illinois.

2. To the Act of Congress of July 2, 1890, commonly called the "Sherman Act," and

3. To the statutes of the State of Illinois, being an act to define trusts and conspiracies against trade and declaring contracts in violation thereof void, approved June 20th, in force July 1, 1893.

The notices of set-offs and bills of particulars accompanying same set up; that the defendant in error, by reason of being a trust as aforesaid, damaged the plaintiffs in error, and each of them, and they were entitled to recover—

1. Treble the amount of the actual damages sustained

by them and each of them, allowed by Act of Congress of date June 2, 1890, commonly known as the "Sherman Act."

2. Actual damages sustained by the plaintiffs in error and each of them, by reason of the defendant in error's violation of an Act of the Legislature of the State of Illinois entitled "An Act to define trusts and conspiracies, etc., in force July 1, 1893.

3. Also special damages suffered.

Under each of these notices are itemized statements of the actual damages suffered by plaintiffs in error, by reason of the formation of defendant in error, and its operation as a trust, etc., which damages are made up of an overcharge of 5 per cent. the plaintiffs in error were compelled to pay on all pipe shipped to them while the defendant in error continued to operate as a trust, and actual damages for the violation of an express contract assumed by the defendants in error, whereby Thomas Connelly was actually compelled to pay and did pay out in excess of contract, to the defendant in error the sum of $5,600, and William E. Dee under the same circumstances was actually compelled to pay and did pay out the sum of $8,624.

## Notices of Special Defenses and Set-offs—the Controlling Feature of the Case.

The *gravamen* of the notices is that ten corporations, nine of which were organized under the laws of the State of Ohio, located in Summit county, in the State of Ohio, within a limited district of said county, known as the "Akron district," all being engaged in the manufacture of a commodity known as standard Akron sewer pipe, which name

is a trade name or designation known and understood in the trade to mean only such pipe as is manufactured in the Akron district, the said ten being all of the manufacturers engaged in the manufacture of said standard Akron sewer pipe, entered into a conspiracy and scheme for the formation of a pool, trust and combine, directly and expressly contrary to and prohibited by the Illinois statutes, referred to in the notices, and also the Federal statute, and the common law, the same being criminal under the said statutes, and under the common law; the intent and purpose of said parties being fully and in detail alleged in the notices, and the parties composing the same, and shown to be in express and direct violation of every line and word of the said statutes and of the common law. That the creature born of this conspiracy and scheme was known as the Union Sewer Pipe Company, the defendant in error herein. That the purpose of the creation of the said Union Sewer Pipe Company was to operate it as a pool to purchase and control the sewer pipe manufacturing business of the "Akron district," manufacturing Standard Akron sewer pipe, and thereby to absolutely monopolize and control and fix and regulate the manufacture and supply and sale of standard Akron sewer pipe, and the prices at which the material was to be purchased and the manufactured product sold, etc., and carry out restrictions in trade, limiting the production, increasing the market price, etc., in the manufacture and sale of sewer pipe. That all the claims in this case arise wholly out of and are in respect of sales of said articles of merchandise in the ordinary course of its business as such a trust or combination, and this action is to recover the alleged price thereof.

## Consolidation of the Cases for Trial.

Inasmuch as both cases of the plaintiff in error were precisely alike, except in the amounts involved, and the pleadings involved the same issue, by agreement of all parties it was ordered by the court that the two cases be submitted to the same jury; that they return separate verdicts, and that the same evidence may be used as a bill of exceptions in each case, or in both. The cases were so tried, and the testimony in one applied to the other, and the cases were treated as consolidated.

## Jurisdiction of the Supreme Court and the Principal Question for its Consideration.

The court below struck out all the notices of set-off of plaintiffs in error, and struck out notices of special defenses relating to the common law in Ohio and Illinois, and to the Act of Congress of July 2, 1900, called the "Sherman Act." The third notice of special defense, viz: The statutes of the State of Illinois "defining trusts and conspiracies against trade, and declaring contracts in violation of same void," *was held to be good if the statute was constitutional.* But it was, in the opinion of the learned Judge, contrary to the 14th Amendment to the Constitution of the United States, because it denied to citizens the equal protection of the laws, and violative of ART. IV, SEC. 22 of the Constitution of Illinois, which forbids class legislation. The jury was accordingly instructed to find verdicts for the plaintiff in the court below.

Therefore, the paramount question for the consideration of this Honorable court is the constitutionality of an Act

passed by the General Assembly of the State of Illinois, entitled "An Act to provide for the punishment of persons, co-partnerships or corporations forming pools, trusts and combinations, and modes of procedure and rules of evidence in such cases." The Act was passed in 1891, and Section 1 of said Act, in substance, provided that if a corporation, partnership, individual or other association of persons should create or enter into and be a member of or a party to any pool, trust, agreement, combination, etc., "with any other corporation, partnership, individual, or any other person or association of persons to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this Act."

Section 6 of said Act provided "any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provisions of the preceding sections of this act *shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment.*"

In 1893, on the 20th of June, a law was approved amending the Act of 1891, by adding to it two sections, one known as Section 7a and the other as Section 7b (Rec., p. 716; Trans., p. 251,) which sections are not involved in this discussion.

On the same day that the amendment to the Act of 1891, was passed, to-wit, the 20th of June, 1893, the Legislature passed an act entitled "An act to define trusts and conspiracies against trade," declaring contracts in violation of the provisions of this act, and making certain acts in violation thereof misdemeanors, and prescribing the punishment therefor, etc.

In the foregoing act, passed on the 20th of June, 1893, was a section upon *which the law was declared unconstitutional, and upon which the decision appealed from in this case is based*, which section is known as Section 9, and reads as follows:

> "*The provisions of this act shall not apply to agricultural products or live-stock while in the hands of the producer or raiser.*"

The Legislature again in 1897, amended the Act of 1891, treating in both amendments the Act of 1891, as being in full force and effect, which amendment is immaterial for the purpose of this case.

The plaintiffs in error pleaded Section 6 of the Act of 1891, re-enacted in Section 10 of the law of 1893, *which gives the right to any purchaser from any corporation, etc., transacting business contrary to the provisions of the said law to plead the act as a defense to any suit for such price or payment.* (For law see Rec., p. 715; Trans., pp. 250–251. For pleas see Rec., pp. 58–70; Trans., pp. 33 to 41.)

## A Specification of the Errors Relied Upon.

### I.

That the said court erred in striking out the notice of set-off contained in the notice of special defenses and set-off attached to the plea in said cause; which notice of set-

off was the same in each case (except in figures) and in the words and figures following, to-wit:

Take further notice that on the trial of this cause the defendant will give in evidence and insist that the plaintiff was before and at the time of the commencement of this suit and still is indebted to the defendant in the sum of seventy-six thousand and five hundred and twenty dollars, for that the plaintiff is and ever since the 1st day of January, 1893, was a combination in the form of a trust in restraint of trade and commerce between the State of Illinois and Ohio and between other States within the United States, and that by reason of the plaintiff being such a combination and as the direct, inevitable and proximate result thereof, the defendant has been injured in his business by reason of acts and things done by the plaintiff and forbidden and declared to be unlawful by an act of Congress of date June 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," to-wit, the selling by the plaintiff while residing and carrying on business in the State of Ohio at divers times between the 25th day of February, 1893, and the 30th day of June, 1896, of divers goods and merchandise, to-wit, sewer and drainage pipes, to the defendant while residing and carrying on business in the State of Ohio, which goods and merchandise the defendant was by force of circumstances beyond the reasonable control of the defendant and wrongfully and designedly brought about solely by the plaintiff with intent to coerce the defendant into purchasing said goods and merchandise compelled to obtain from and purchase of the plaintiff at prices largely in excess of the true and real market price thereof—that is to say, the defendant was compelled, as afore-

said, to pay and did pay to the plaintiff for said sewer and drainage pipes shipped between said dates by the plaintiff from the State of Ohio to the defendant in the State of Illinois the sum of $23,840 over and in excess of the true and real market value thereof, whereby the defendant lost and was actually damaged in his business of a sewer contractor in the sum of $23,840; wherefore the defendant now claims, under and by virtue of the provisions of said act of Congress, by way of set-off against the plaintiff in this action, the said sum of $76,520, being three times the amount of his said total loss and damage, together with reasonable attorneys' fee, to-wit, $5,000 and his costs of suit.

And take further notice that the defendant will also give in evidence and insist that the plaintiff was, and at the time of the commencement of this suit and still is, indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars ($23,840), damages sustained by the defendant by reason of the plaintiff's becoming and since the 1st day of January, 1893, continuing to be and trade as a trust or combination of persons and corporations doing business in the States of Ohio and Illinois and between said States, organized for the express purpose of unlawfully and contrary to the provisions of an act of the Legislature of the State of Illinois entitled "An Act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void and making certain acts and violations thereof misdemeanors and prescribing punishment thereof and matters connected therewith, approved June 30, 1893, in force July 1, 1893," and that by reason of the plaintiff being and doing business as such a trust or combination, as aforesaid, the defendant

was by force of circumstances beyond his reasonable control, and which existed and were wrongfully and designedly brought about by the plaintiff with intent to coerce *of* the defendant into *to* purchasing only from the plaintiff, compelled to obtain from and did obtain from the plaintiff between the 25th day of February, 1893, and the 30th day of June, 1896, large quantities of certain merchandise, to-wit, sewer and drainage pipes, and was compelled and did pay therefor the sum of $126,940, which amount was largely in excess of the true and real market value thereof, to-wit, the sum of $103,100.

And take further notice that the defendant will give in evidence and insist that the plaintiff was, and before and at the time of the commencement of this suit and still is, indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars ($23,840), damages sustained by the defendant by reason of the plaintiff's becoming and since the 1st day of January, 1893, continuing to be and trade as a trust or combination of persons and corporations doing business in the States of Ohio and Illinois and between said States, organized for the express purpose of unlawfully and contrary to the provisions of an act of the Legislature of the State of Illinois entitled "An Act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdemeanors, and prescribing punishment thereof and matters connected therewith, approved June 30, 1893, in force July 1, 1893," and that by reason of the plaintiff being and doing business as such a trust or combination, as aforesaid, the defendant was, by force of circumstances beyond his reasonable control and which existed and were wrong-

fully and designedly brought about by the plaintiff with intent to coerce the defendant into purchasing only from the plaintiff, and was compelled to obtain from and did obtain from the plaintiff between the 25th day of February, 1893, and the 30th day of June, 1896, large quantities of certain merchandise, to-wit, sewer and drainage pipes, and was compelled to pay and did pay therefor the sum of $126,940, which amount was largely in excess of the true and real market value thereof, to-wit, the sum of $103,100.

And take further notice that the defendant will give in evidence and insist that the plaintiff was and before and at the time of the commencement of this suit and still is indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars, money had and received by the plaintiff to the use of the defendant, in that the plaintiff became on or about the 1st day of January, 1893, and has ever since continued to be and operate as a trust or combination of persons and corporations doing business in the State of Ohio and between said State and the State of Illinois, and organized and existing for the express and sole purpose of unlawfully controlling and regulating, in restraint of trade and contrary to the common law, the market prices of certain articles of commerce, to-wit, sewer and drainage pipes; that the defendant was compelled, wholly by reason of the existence of such a trust or combination and of the pressure of circumstances beyond reasonable control of the defendant, and wrongfully and designedly brought about by the plaintiff with intent to coerce the defendant into purchasing only of the plaintiff, to purchase and did purchase from the plaintiff, acting and doing business as such a trust or combination, at various dates between the 25th day of February, 1893, and

the 30th day of June, 1896, large quantities of said articles of commerce of the true and real market value of $103,100, and no more, at the unreasonable, exorbitant, fictitious and compulsory price of $125,940.

And on the trial of this action the defendant will set-off and allow to the plaintiff, against any true and lawful demand on its part to be proved on such trial, so much of the said sums of money so due from the plaintiff to the defendant, as aforesaid, as will be sufficient to satisfy and discharge such demand.

And you will further take notice that at the trial of said cause the defendant will give in evidence and insist that all and singular the matters and defenses hereinbefore specially given notice of arose out of sales of goods, wares and merchandise made by the plaintiff to the defendant, the prices of which are sought to be recovered in this action, and that such sales were made in furtherance of and connected with the unlawful combination in the nature of a trust, as aforesaid, and that the prices charged for the said goods, wares and merchandise so sold and the prices of other goods, wares and merchandise sold and delivered by the plaintiff to the defendant and paid for by him were unreasonable and produced by the unlawful combination in the nature of a trust aforesaid, and that this defendant does set-off the amount of such unreasonable prices so produced in excess of the actual value and reasonable prices at the time of such sales as damage to the plaintiff's demand in this action, and will ask judgment against the plaintiff for such excess; and

You will take further notice that the defendant will do all this in connection with all and singular the other mat-

ters of set-off of which you have heretofore been given notice.

And the court so erred for the following reasons, to-wit:

(*a*) The facts set out in the said special notice of set-off were proper defenses under the general law of the State of Illinois and the general law of the United States and the general law of the State of Ohio.

(*b*) The facts set out in said special notice of set-off were proper defenses under the act of the General Assembly of the State of Illinois, being an Act to define trusts and conspiracies against trade, declaring contract in violation of the provisions of this act void, and making certain acts in violation thereof misdemeanors, prescribing punishment therefor and the matters connected therewith, approved June 20th, in force July 1, 1893, the said act being amendatory and supplemental to an act of the General Assembly entitled "An Act to provide for the punishment of persons, co-partners, or corporations forming pools, trusts, and combinations, and modes of procedure and rules of evidence in such cases," approved June 11, 1891; in force July 1, 1891.

(*c*) The facts set out in said special notices of set-off were proper defenses under the act of Congress of the United States of America entitled "An act to protect trade and commerce against unlawful restraint and monopolies," approved July 2, 1890, and commonly known as the "Sherman *anti*-trust act."

(*d*) The damages set out in the said special notices of set-off were proper damages allowable and recoverable under the act of Congress aforesaid, and under the bill of particulars filed in said cause in the words and figures following, to-wit;

Bill of particulars of set-off of William E. Dee:

*First Set-off.*

Treble the amount of the actual damages sustained allowed by act of Congress of date June 2, 1890, to-wit:

| | |
|---|---|
| Overcharge of 5 per cent. on 664 cars of ring pipe and fittings paid for by defendant between February 24, 1893, and June 30, 1896, at the average price of about $500.00 per car, $16,100.00 | $48,300.00 |
| Overcharge of 2½ per cent. on 512 cars of socket pipe paid for by defendant between February 24, 1893, and June 30, 1896, at the average rate of about $600.00 per car, $7,680.00 | 23,040.00 |
| Reasonable attorneys' fees allowed by said act | 5,000.00 |
| | $76,340.00 |

*Second Set-off.*

| | |
|---|---|
| Actual damages sustained by the defendant by reason of plaintiff's violation of an act of the Legislature of the State of Illinois, entitled "An act to define trusts and conspiracies, etc., in force July 1, 1893," as above set forth, of 5 per cent. more than market value of 644 cars of ring pipe and fittings at average price of about $500.00 per car | $16,100.00 |
| Of 2½ per cent. more than market value of 512 cars of socket pipe at average price of about $600.00 per car | 7,680.00 |
| | $23,780.00 |

*Third Set-off.*

| | |
|---|---|
| To money had and received by plaintiff of defendant contrary to law, viz., 5 per cent. of $322,000.00 | $16,100.00 |
| 2½ per cent. of $307,200.00 | 7,680.00 |
| | $23,780.00 |

Bill of particulars of set-off of Thomas Connelly:

*First Set-off.*

Treble the amount of the actual damages sustained, allowed by act of Congress of date June 2nd, 1890, to-wit:

| | |
|---|---|
| Overcharge of 5 per cent. on 255 cars of ring pipe and fittings paid for by defendant between February 24th, 1893, and June 30th, 1896, at the average price of about $550 per car, $139,841.46—$6,992.07 | $20,976.21 |
| Overcharge of 2½ per cent. on 688 cars of socket pipe paid for by defendant between February 24th, 1893, and June 30th, 1896, at the average rate of about $600 per car, $10,331.41 | 30,994.23 |
| Amount paid, $413,256.76. | |
| Reasonable attorneys' fees allowed by said act | 5,000.00 |
| | $56,970.44 |

*Second Set-off.*

Actual damages sustained by the defendant by reason of plaintiff's violation of an act of the Legislature of the State of Illinois, entitled "An act to define trusts and conspiracies, etc., in force July 1st, 1893," as above set forth, of 5 per cent. more than market value, of about 255 cars of ring pipe and fittings at an average price of about $550 per car, for which defendant paid the plaintiff $139,841.46, and of 2½ per cent. more than market value of 688 cars of socket pipe at an average price of $600 per car, on which defendant paid to the plaintiff the sum of $413,256.76:

| | |
|---|---|
| Damages on ring pipe and fittings | $ 6,992.07 |
| Damages on socket pipe | 10,331.41 |
| | $17,323.48 |

*Third Set-off.*

To money had and received by plaintiff of defendant contrary to law, viz:

| | |
|---|---|
| 5 per cent. of $139,841.46..... | $6,992.07 |
| 2½ per cent. of $413,256.76..... | 10,331.41 |
| | $17,323.48 |

On motion of defendant in error, before the trial the court struck these notices from the files. (Trans., p. 18; Rec., p. 36.)

II.

The court erred in ruling, on the 24th day of January, A. D., 1900, during the progress of the trial of said cause, as follows: After full and extended argument and the citation of authorities by counsel for all parties in interest upon the foregoing questions, the court denied the motion to strike out the special matters of defense set up in the notices filed by defendants and allowed the motion to strike out the motion for claim of set-off; to which ruling of the court defendants, by their counsel, then and there duly excepted.

This relates to the striking out of notices of set-off set out in the first assignment of error; plaintiffs in error were not permitted to introduce evidence on the trial in the court below in support thereof, which evidence would go to sustain the allegations in notices, and the damages set out in bills of particulars filed. (Trans., p. 18; Rec., p. 36.)

III.

The court erred in its ruling in the trial of said cause, on the 24th day of January, A. D. 1900, in sustaining the ob-

jection of the plaintiff to the motion of the defendants to file amendments to the notice of special defenses attached to the plea of general issue in said cause in the words and figures following, to-wit:

*Notice of Special Defenses.*

To The Union Sewer Pipe Company, plaintiffs in the above entitled cause, and to Edwin Walker, Esq., and Herbert W. Hamlin, attorneys for said plaintiff:

Take notice that upon the trial of this cause the defendant will, in defense thereto, introduce in evidence and rely upon the special facts and matters hereinafter stated—that is to say:

*First*, That heretofore, to-wit, a long period prior to the first day of January, A. D. 1893, the defendant was engaged in the business of a dealer and contractor in sewer and drainage pipe in the city of Chicago; that one of the principal features of the business of the defendant was to furnish and supply a quantity of sewer pipe for use by the city of Chicago and to furnish and supply sewer pipe for use by contractors with the city of Chicago for the construction and building of main sewers; that prior and up to the first day of January, A. D. 1893, the said defendant, William E. Dee, and his predecessor in business, William M. Dee, father of the said defendant, were engaged in said business; that prior to the first day of January, A. D. 1893, and for a period of at least five years theretofore and for a period of about five years thereafter the specifications issued by the city of Chicago for the construction of sewers provided that Akron sewer pipe should be used; that at such periods the commodity known as Akron sewer pipe had a trade designation and meaning and was universally understood to

mean only such sewer pipe as was manufactured in Summit county, in the State of Ohio, and within a limited district of said county, known as the Akron district, and that prior to the first day of January, A. D. 1893, the said sewer pipe was manufactured exclusively by the following firms and corporations, to-wit: Buckeye Sewer Pipe Company, the Summit Sewer Pipe Company, the National Sewer Pipe Company, the Akron Sewer Pipe Company, the Hill Sewer Pipe Company, Robinson Bros. Company, the Crown Sewer Pipe Company, the Camp & Thompson Sewer Pipe Company, the Sperry Sewer Pipe Company, and the Pennsylvania Sewer Pipe Company; that on or about the first day of January, A. D. 1893, all of the said Companies enumerated, confederated and combined together unlawfully and contrary to the common law and the general law and statutes of the State of Illinois and of Ohio, and contrary to the general law of the United States of America and of the law of the different States thereof and contrary to the statutes of the United States of America, for the purpose of limiting the production of sewer pipe known as Akron sewer pipe of the different articles of merchandise manufactured and produced by the said firms and corporations, and for the purpose of increasing the market prices thereof, and for the purpose of preventing competition in the manufacturing, making, transportation, sale or purchase of said articles of commerce, and for the purpose of fixing standards of figures whereby the prices of said sewer pipe and articles of merchandise intended for sale, use, and consumption in the State of Ohio and in the State of Illinois and throughout the United States should be controlled and established; that on or about the first day of January, A. D. 1893, the said firms and corporations hereinbefore particu-

larly named entered into a contract with the corporation known as The Union Sewer Pipe Company, the plaintiffs in this action, whereby they and each of them undertook and agreed to sell all the products of the factories of each of them through the medium of the said Union Sewer Pipe Company; that the said Union Sewer Pipe Company, under and by virtue of such agreement, notified the said defendant that any and all sewer pipe or other merchandise theretofore manufactured by any of the said firms or corporations and to be manufactured by any of the said firms and corporations could be purchased only from the said Union Sewer Pipe Company; that by reason of the said combination and by reason of the contract between the said Union Sewer Pipe Company and all of the said firms and corporations the said firms and corporations hereinbefore mentioned undertook and agreed to sell its products only to such persons as were named and designated by the said Union Sewer Pipe Company, and to fulfill only such contracts as were made approved, or accepted by the said Union Sewer Pipe Company; that after said combination the said Union Sewer Pipe Company alone controlled the entire manufactured product and output of all of the said firms and corporations, and it was impossible for this defendant or any other person or persons whomsoever to purchase any of the commodity known as Akron sewer pipe from the individual manufacturers or in any method other than through the medium of the said Union Sewer Pipe Company; that after the said Union Sewer Pipe Company in this manner entered into the business aforesaid the price of Akron sewer pipe was raised beyond the reasonable and ordinary price thereof and beyond the prices theretofore prevailing, and an excessive charge for

the Akron sewer pipe was thereafter made to this defendant and to others dealing in and requiring said Akron sewer pipe for the purpose of their business and over and above the fair market value thereof; that at the time of the contracts and agreements between the said Union Sewer Pipe Company and the firms and corporations aforesaid the said defendant was obligated to furnish large quantities of Akron sewer pipe to his customers and to sewer contractors within the city of Chicago; that the said defendant could not obtain any substitute for the said Akron sewer pipe and no substitute for the same existed, and that after the said Union Sewer Pipe Company began the transaction of business it notified this defendant that he must pay the increased price demanded and prices unreasonable and in excess of the market value of the said sewer pipe and in excess of the price prevailing prior thereto, or that said sewer pipe would not be furnished or supplied; that the defendant thereupon, by force of circumstances beyond his reasonable control and wrongfully and designedly and intentionally brought about solely by the plaintiff, was compelled to obtain the said merchandise and to pay for the same or to agree to pay for the same prices largely in excess of the true and real market price thereof, such prices being caused by reason of the said contracts and agreements; that at the time of the said contracts and agreements between the said Union Sewer Pipe Company and the firms and corporations aforesaid this defendant was a party to a contract between him and the firm of Camp & Thompson, one of the firms entering into said agreement and contract with the said Union Sewer Pipe Company, whereby the said Camp & Thompson agreed to furnish and supply to this defendant three hundred and

eight (308) carloads of the said Akron sewer pipe for the supply of the customers of the said defendant in the said city of Chicago; that the said Camp & Thompson agreed to deliver the said three hundred and eight (308) carloads in various installments and for the purpose of carrying out specific orders and contracts requiring the said aggregate amount of three hundred and eight (308) carloads between the said contracts being entered into by the said defendant and the various contractors within the city of Chicago, and that the requirements and needs of this defendant of the said three hundred and eight (308) carloads for such purpose *was* known to the said Camp & Thompson and to the said plaintiff; that prior to the said contracts and agreements between the said plaintiff and the said firms and corporations the said Camp & Thompson had made partial shipments under the said agreement to supply the said three hundred and eight (308) carloads of Akron sewer pipe to the said defendant; that after the said agreement and contract between the said plaintiff and the said firms and corporations the said plaintiff, The Union Sewer Pipe Company, acquired all of the rights of the said Camp & Thompson in and to the said contract, and assumed and agreed to perform all of the obligations of the said Camp & Thompson thereunder; that the price at which the said three hundred and eight (308) carloads were to be delivered to this defendant was at the rate of eighty per cent. (80%) discount from the western list price, and that this sum equalled the amount of one hundred and twenty dollars ($120) a carload; that the said price of one hundred and twenty dollars ($120) for an average carload of said Akron sewer pipe was the prevailing market price thereof and was the fair and reasonable value thereof; that as soon as

the Union Sewer Pipe Company made deliveries to this defendant of portions of the said three hundred and eight (308) carloads it demanded that this defendant pay an amount equal to seventy-five (75) per cent. discount from the said western list price, and aggregating an increased price of thirty dollars ($30) for each of the said three hundred and eight (308) carloads of said Akron sewer pipe remaining to be delivered; that this defendant, by force of circumstances beyond his reasonable control, and wrongfully and designedly brought about solely by this plaintiff, was compelled to obtain the said sewer pipe and purchase the same at such prices which were largely in excess of the real market value thereof, and were purchased by reason of the contract between the said Union Sewer Pipe Company and the said firms and corporations, and that this defendant does set-off the amount of said increased price on the said three hundred and eight (308) carloads and on other sewer pipe which this defendant was so forced to purchase for the exigencies of his contracts in the city of Chicago as against the plaintiff's demand in this action, and does demand judgment for the amount thereof, as particularly set out in the bill of particulars filed by this defendant in this cause.

And you will further take notice that this defendant will urge all the said defences and will ask for all of the said set-offs in connection with all and singular the other matters and defenses of which you have heretofore been notified, and that this defendant does urge all of the said special matters herein stated in additional and in amendment to all and singular the other matters and things contained in the notice of special defenses and set-offs filed in this cause.

You will further take notice that at the trial of said cause the defendant William E. Dee, will give in evidence and insist that heretofore, to-wit, on, to-wit, the 15th day of January, A. D. 1893, he entered into a contract with a certain firm known as Camp & Thompson, manufacturers of pipe known as Akron pipe with its principal plant and office in Cuyhoga Falls, in the State of Ohio, by the terms where of the said Camp & Thompson agreed to deliver during the year 1893, 308 carloads of pipe known and designated as city pipe at and for a price equal to eighty per cent. discount from the list price of such pipe; that such contract was in existence and shipments thereunder were made at the time of the formation of the corporation known as the Union Sewer Pipe Company; that on the organization of the said Union Sewer Pipe Company and the beginning of the business by the said Union Sewer Pipe Company, the Union Sewer Pipe Company assumed and agreed to perform the said contract; that after assuming and agreeing to perform the said contract the said Union Sewer Pipe Company made shipments thereunder, but failed and refused to accept the price of eighty per centum from the list price aforesaid, but demanded seventy-five per centum therefrom; that the defendant ordered said pipe for the purpose of fulfilling contracts made in the city of Chicago for the building of sewers, and that he was under the necessity of delivering such pipe and not pipe of any other quality or standard, in order faithfully to carry out the provisions of such contracts; that by reason thereof the said defendant was duressed into paying a price for said pipe equal to seventy-five per cent. discount from the list price thereof in lieu of eighty per cent. discount from the said list price, and by reason thereof he suffered dam-

ages to the extent of five per cent. upon each carload delivered under the terms of said contract; and at the trial of said cause the said defendant will set-off the said amount of such differences between seventy-five per cent. and eighty per cent. of such list price for all of the carloads delivered under the contract aforesaid, and will ask judgment against the plaintiff for the excess of such amount over the amount in this action, if any.

(Signed) JNO. R. MCFEE and
O'DONNELL & COGHLAN,
*Attorneys for Defendant.*

And the court so erred in refusing to permit the said defendant to file the same amendments to the special defenses under their plea of general issue for the reason that the said amendments and each of them aver special matters of substantial defense under the general law and of the State of Ohio, and of the State of Illinois, and of the United States, and under the Act of Congress aforesaid approved July 2nd, A. D. 1890, *and under the Act of Congress aforesaid approved July 2nd, A. D. 1890*, and under the said Act of the General Assembly of the State of Illinois, hereinbefore set out in this assignment of errors, approved June 20th, in force July 1st, 1893, said Act being supplemental and amendatory to the said Act, hereinbefore particularly mentioned in this assignment of errors, approved June 11th, A. D. 1891, in force July 1st, A. D. 1891.

A similar notice was offered to be filed for Thomas Connelly alleging the same facts, but for 200 carloads of pipe, which the court also refused leave to file, and this assignment applies likewise to this.

IV.

The court erred in excluding the depositions of Frank S. Monnett, attorney-general of the State of Ohio, for the reasons that the said depositions on their face showed that they were taken and certified under the law of the land and the practice of said court, and the said depositions contained testimony relevant to the issues in this cause, as follows:

*a.* They showed an admission of the president and other officers of the Union Sewer Pipe Company as to the effect of the contract between the said Union Sewer Pipe Company and its constituent members.

*b.* It showed the opinion of an experienced lawyer as to the contents and effect of a formal pleading filed by the said Union Sewer Pipe Company in a collateral suit, wherein they set up as against the plaintiff in such suit the defense that the said Union Sewer Pipe Company was a trust and an unlawful combination, in violation of the law the State of Ohio and of the Act of Congress.

*c.* It contained proof of the general and common law of the State of Ohio as to the effect of the contract between the Union Sewer Pipe Company and its constituent members, to-wit, that the said contract was violative of said law and deprived the Union Sewer Pipe Company of a right to maintain an action in the courts of Ohio to recover on a contract made with it in the course of its business.

*d.* It contained proof that the organization known as the Union Sewer Pipe Company was a trust and an unlawful combination in restraint of trade, contrary to the law of Ohio.

*c.* It contained proof of a proceeding instituted under the law of Ohio before the attorney-general and the governor of said State on an application for a *quo warranto* proceeding against the said Union Sewer Pipe Company because of its being a trust and an unlawful combination in restraint of trade, contrary to the laws of the State of Ohio and the Act of Congress, known as the Sherman *anti*-trust Act, of July 2nd, A. D. 1890, and contained an admission at said trial and hearing by the officers of the said Union Sewer Pipe Company and its attorney at such hearing that the said Union Sewer Pipe Company was a trust and an unlawful combination in restraint of trade, contrary to the laws of said State and contrary to the said Act of Congress, known as the Sherman *anti*-trust Act, of July 2nd, A. D. 1890.

V.

The court erred in ruling and stricking out an amendment filed by the defendants on the 26th day of January, A. D. 1900, the said amendment being in words and figures the same as the notice of special defense and set-off hereinbefore set forth under the third assignment of error herein with the exception of the words "and does demand judgment for the amount thereof as particulary set out in the bill of particulars filed by this defendant in this cause," being the last two lines in the second last paragraph and the words in the second line of the last paragraph, "and will ask for all of the said set-off," being omitted therefrom. The court so erred because it had permitted the filing of said amendments on the 26th day of January, A. D. 1900, during the progress of said trial.

The court permitted this amendment to be filed, and

afterwards denied it and struck the amendments from the files.

VI.

The court erred in instructing the jury to find a verdict for the plaintiff, and in charging the jury as follows:

Plaintiff in this case brings suit to recover upon certain promissory notes given by defendant for balance due on purchases and deliveries of sewer pipe. Defendant pleads the general issue and gives notices thereunder of three special defenses, all of which are based upon the theory that plaintiff was a trust or combination organized for the express purpose of creating and carrying out restrictions in trade, contrary—

"1. To the common law in force both in Ohio and Illinois;

"2. To the Act of Congress of July 2, 1890, commonly called the Sherman Act, and

"3. To the Statutes of the State of Illinois taking effect on July 1, 1893.

As to the matters set out in the first notice of special defense, it is undoubtedly true that by the common law contracts which are themselves directly in restraint of trade may in a proceeding based thereon be declared void and unenforceable by the courts, but there is no case brought to the attention of the court in which it has been held that at common law a contract not in itself in restraint of trade is void because one of the parties thereto is a party to a contract which is in restraint of trade, and the one contract is indirectly based upon the other. The fact that one party to a contract is engaged in illegal acts will not at common law avail the other party as a defense to the enforcement

of a contract in itself legal. The first notice of special defense will therefore be stricken out.

It will be seen by an inspection of the so-called Sherman Act, and of the opinion of Justice PECKHAM in the Addystone Pipe and Steel Company case, decided by the United States Supreme Court on December 4, 1899, that the Act only covers contracts which are themselves directly in restraint of trade, and does not affect those which are "merely indirectly, remotely, incidentally or collaterally regulate to a greater or less degree interstate commerce among the States." It therefore follows that the second matter of special defense set up must be stricken out.

Now, coming to the ground of special defense set up in the third notice, to-wit, the Illinois statute which went into effect on July 1, 1893, this statute in terms provides that the defense herein set up may be maintained as a bar; and if the statute is valid, then plaintiff cannot recover in this case if it be, as averred by defendant, a corporation organized in restraint of trade and a trust under the definition contained in said statute. Plaintiff contends that the said statute is unconstitutional, (1) because it is obnoxious to Section 1 of the fourteenth amendment of the Federal Constitution, which reades in part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of laws."

And also (2) because it is in contravention of Section 22 of Article 4 of the Constitution of the State of Illinois, which reads in part as follows:

"In all other cases where a general law can be made applicable, no special law shall be enacted."

The said statute of July 1, 1893, after defining a trust and setting out the various penalties provided for violation of the Act, provides, in Section 9, that

"The provisions of this Act shall not apply to agricultural products or live-stock while in the hands of the producer or raiser."

Can it be claimed that under this clause (9) every person within the jurisdiction of the State of Illinois has equal protection of the laws? Is not this class legislation? Is it in accordance with Section 1 of the fourteenth amendment to the Federal Constitution that those who produce or raise agricultural products or live-stock shall be exempted from the provisions of the statute which by its terms are binding upon every other citizen or person within the State? I think clearly not. I am of the opinion that this statute contains both class and special legislation and is in contravention of both the Federal and State Constitutions and therefore void.

It is urged that, granting the unconstitutionality of said ninth clause, yet it may be declared void without affecting the validity of the remaining clauses of said Act. If this were so, then by declaring said clause void, the courts would make the Act binding upon those classes of persons within the State which the Legislature had specially exempted from its provisions. This would be judicial legislation of the most flagrant character. In my opinion the said clause nine taints the whole Act and renders it all void. Therefore, the special defense set up in the third notice must be stricken out.

It follows upon the record, as it is with the said three

matters of special defense stricken out, that a verdict must be given for the plaintiff for the face of the notes in suit and interest thereon from maturity at 5 per cent, and the jury will be so instructed.

The court so erred for the following reasons, to-wit:

*a.* At the close of the testimony in behalf of the defendant no motion was made to exclude said testimony and the defense supported thereby and to instruct the jury at such time to find and return a verdict for the plaintiff.

*b.* At the close of the testimony in rebuttal no motion was made on behalf of the plaintiff to exclude the testimony and to instruct the jury to find and return a verdict for the plaintiff,

*c.* At the close of the evidence in surrebuttal no motion was made to exclude the testimony and to instruct the jury to find and return a verdict for the plaintiff.

*d.* At the close of all the testimony in the case no motion was made on behalf of the plaintiff to exclude the testimony and to instrect the jury to find and return a verdict for the plaintiff.

*e.* The court in instructing the jury to find a verdict for the plaintiff erred in ruling that although the plaintiff was an unlawful combination, in restraint of trade, under the general and common law, both of the State of Ohio and of the State of Illinois, nevertheless such fact was not a defense to the action.

*f.* In ruling that no contract in this cause was sued upon which in itself was in restraint of trade, whereas a written contract between the plaintiff and the defendant Dee, in restraint of trade *of* and void under the common and general law, both of the State of Ohio and of the State

of Illinois, constituted the foundation of the plaintiff's cause of action; which contract was in the words and figures following, to-wit:

Memorandum of an agreement made and entered into this 20th day of August, A. D., 1895, between the Union Sewer Pipe Company, of the city of Akron, county of Summit and State of Ohio, party of the first part, and William E. Dee, of the city of Chicago, county of Cook, State of Illinois, party of the second part, witnesseth:

The party of the first part agrees to sell and deliver to the party of the second part sewer pipe, free on board cars, at its factories at the following discounts off the western price list, to-wit:

| | |
|---|---|
| First-class socket pipe, from 2" to 20" inclusive | 85 Per Ct. |
| 24" socket pipe | 80 " " |
| 6" and 9" ring pipe with rings | 85 " " |
| 10" and large ring pipe with rings | 75 " " |
| All sizes second-class socket pipe | 90 " " |
| All sizes second-class ring pipe and rings | 87½" " |
| All sizes second-class ring pipe without rings | 90 " " |
| Ring cull pipe with rings | 85 " " |
| Ring cull pipe without rings | 87½" " |

All shipments by said first party in any one money to be settled for by note or acceptance of the second party, payable at bank in Chicago in ninety days from the tenth (10th) of the month following the month in which shipments are made, or if preferred by said second party settlements may be made in cash by the tenth of the month following the month in which the shipment is made and for such cash settlement an additional discount of two per cent. (2 per cent.) on the net amount may be deducted from the bill, but in no case will the first party accept city or town warrants in settlement of said shipment.

In consideration of the foregoing agreement the party of the second part agrees to purchase and handle exclusively, the sewer pipe handled and sold by the first party except when the first party is unable to furnish the party of the second part, and to place with the first party all orders for sewer pipe that they, the second party, may make.

In consideration of receiving the entire trade for sewer pipe from party of the second part, it is agreed by party of the first part that a rebate of one per cent. (1 per cent.) of the gross sales be allowed said second party. Said rebate to be paid second party at the close of each year provided the terms of this agreement have been faithfully carried out.

It is further agreed between said first and second parties that said first party will supply the second party twenty-five car loads of socket pipe of sizes 2" to 20" inclusive at 87½ discount f. o. b. car works. The above rebate of one per cent. will not apply on the pipe sold at 87½ discount.

It is further agreed that said first party permits said second party to purchase twenty-five cars of sewer p pe from H. B. Camp, Greentown, Ohio, and twenty-five car loads of pipe from the Chicago Sewer Pipe Company, Brazil, Indiana, but no more, and said second party consents to allow said first party access to his books to determine when above pipe has been delivered.

The said second party further agrees to sell on and after September 1, '95, all sewer pipe purchased from the party of the first part free on board cars in car load lots, o' at their respective yards or places of business in the city of Chicago or in Cook county, at the following discounts from the Western price list, namely:

| | | |
|---|---|---|
| 6" and 9" ring pipe with rings and socket pipe up to and including 20," on yard | 70 | Per Ct. off list. |
| 24" socket pipe on yard | 60 | off list. |

By car load lots f. o. b. cars in Chicago:

| | | |
|---|---|---|
| 6" and 9" ring pipe and rings and socket pipe up to and including 20" | 75 | off list. |
| 24" socket pipe | 67½ | Per Ct. " |

In no case shall seconds or culls be shipped by first party for use within the corporate limits of the city of Chicago.

Upon receipt of satisfactory evidence of violation of the terms of this agreement by said second party it is agreed between the first and second parties that it remains optional with the first party to cancel this contract with the second party and the first party will refuse to sell pipe to said second party.

This contract may be terminated by either party giving the other thirty days' written notice of such desire.

In witness whereof, we have hereunto affixed our hands and seals on the day and date first above written.

THE UNION SEWER PIPE CO.

(Signed) WM. E. DEE.

B. W. ROBINSON, *Sec'y.*

In defendant Connelly's contract the name Thomas Connelly was inserted where the words William Dee are contained in the above.

*g.* Because the court erred in ruling and instructing the jury to find and return a verdict for the plaintiff against both of said defendants that the cause of action was not a contract in itself in restraint of trade, whereas the declaration in this cause sued under the common counts for goods

bargained and sold under and in pursuance of a contract in writing between both defendants and the plaintiff void as in restraint of trade under the common and general law, both of the State of Ohio and of the State of Illinois.

*h.* The court erred in instructing the jury to find and return a verdict for the plaintiff; ruled that the defense set up in the special notice of defense that the cause of action in this case was barred by the said Act of Congress of July 2nd, 1890, commonly known as the Sherman anti-trust act, was not a proper defense.

*i.* Because the court erred in instructing the jury to find and return a verdict for the plaintiff; expressly ruled that the Act of July 1st, 1893, of the Legislature of the State of Illinois, amendatory and supplemental to the said act of the General Assembly entitled "An act to provide for the punishment of persons, co-partners or corporations forming pools, trusts and combinations and modes of procedure and rules of evidence in such cases. Approved June 11th, A. D. 1891, in force July 1st, A. D. 1891," was unconstitutional and void and in conflict with the fourteenth amendment of the Constitution of the United States, whereas the said act is not violative of the Constitution of the United States or any amendment thereto; said act is in the words and figures following, to-wit:

ACT OF 1893.

SEC. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them for either, any or all of the following purposes: First—to create or carry out restrictions in

trade. Second—to limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. Fourth—to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established upon any article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this State; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity *after the title to such article or commodity* shall have passed from such vendor or manufacturer. Fifth—to make or enter into, or examine or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or card or price-list, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of

any such article or commodity that its price might in any manner be affected.

SEC. 2. That any corporation holding a charter under the laws of this State which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

SEC. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney-general or prosecuting attorney, upon his own motion to institute suit or *quo warranto* proceedings, at any county in this State (in) which such corporation exist, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

SEC. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney-general to enfore this provision by injunction or any other proper proceedings, in any county in which such foreign corportion does business, in the name of the State on his relation.

SEC. 5. Any violation of either or all of the provisions of Section 1 of this act shall be and is hereby declared to be a conspiracy against trade, and a misdemeanor; and any person who may be or may become engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall, as principal, manager, director agent, servant or employe, or in any other capacity knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder, or in pursuance thereof shall be punished by fine not less than two thousand dollars or more than five thousand dollars.

SEC. 6. In any indictment or information for any offense named in this act. It is sufficient to state the purposes and effect of a trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how or where it was created.

SEC. 7. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument or which it may have been based, or that it was evidenced by any written instrument at all.

SEC. 8. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforcible either in law or equity.

SEC. 9. The provisions of this act shall not apply to agricultural products or live-stock while in the hands of producer or raiser.

SEC. 10. Any purchaser of any article or commodity, from any person, firm, corporation or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the price or payment of such article or commodity and may plead this act as a defense to any suit for such price or payment.

[NOTE.—Act of 1891, is set out in transcript of record, page 250. This decision is based upon Act of 1893, especially Sections 9 and 10 of said act. Act of 1891, is substantially the same so far as concerns this case, except it does not contain Section 9—the section upon which the

Act of 1893, was declared to be unconstitutional by court below.]

*j.* The court erred in instructing the jury to find and return a verdict for the plaintiff; ruled that the 9th clause of the said act of July 1, 1893, of the Legislature of the State of Illinois was in violation of the 14th amendment of the Constitution of the United States.

*k.* The court erred in instructing the jury to find and return a verdict for the plaintiff; ruled that because clause nine of the said Act of July 1, 1893, of the Legislature of the State of Illinois was unconstitutional under the 14th amendment to the Constitution of the United States the whole act was void, whereas the said ninth clause was not in violation of the said 14th amendment to said Constitution, and even if the same were in violation thereof the entire act would not, in consequence thereof, be void.

*l.* The court erred in instructing the jury to find and return a verdict for the plaintiff in not holding that if the said act of July 1, 1893, were unconstitutional and void, that thereupon the said Act of July 1, 1891, of which the said Act of July 1, 1893, was *an* amendatory and supplemental, would be revived, and that the defense set up in the special notice attached to the defendants' plea were admissible under the said Act of July 1, 1891.

**Notices of special defense stricken out, and notice held good, if law was constitutional:**

Take notice that upon the trial of this action the defendant will, in defense thereto, rely on the special matters hereinafter stated—that is to say:

*Firstly.* That the plaintiffs—and at all times since about the 1st day of January, 1893, has been a trust or combina-

tion of the capital, skill, and acts of divers persons and corporations carrying on a commercial business in the States of Ohio and Illinois and between said States and elsewhere in the United States of America, and organized for the express purpose of unlawfully and contrary to the common law creating and carrying out restrictions in trade, to-wit, in the trade of buying, selling and otherwise dealing in certain articles of merchandise, to-wit, sewer and drainage pipes; and also for the express purpose of unlawfully and contrary to the common law limiting the production of said articles of merchandise and increasing the market price thereof; and also for the express purpose of unlawfully and contrary to the common law preventing competition in the manufacturing, making, transportation, sale or purchase of said articles of commerce; also for the express purpose of unlawfully and contrary to the common law fixing standards or figures whereby the prices of said articles of merchandise intended for sale, use and consumption in this State should be controlled and established; and also for the express purpose of unlawfully and contrary to the common law being a pretended agency whereby the sale of said articles of commerce should and might be covered up and made to appear to be for the original vendors thereof, and so as to enable the original vendors or manufacturers thereof to control the wholesale and retail price of such articles of commerce after the title thereto had passed from such vendors or manufacturers; and for the further express purpose of unlawfully and contrary to the common law making and entering into and carrying out a certain contract or certain contracts by which the several persons or corporations forming the plaintiff or being the pretended stockholders thereof, to-wit, have bound themselves not to sell, dispose of, or transport said

articles of commerce below certain common standards, figures or card or list prices in excess of the true market values thereof, and by which they have agreed to keep the prices of said articles of commerce at certain fixed or graduated figures, and by which they have established certain settled prices of said articles of commerce between themselves and others so as to preclude a free and unrestricted combination among themselves and others in the sale and transportation of said articles of commerce, and by which they had agreed to pool, combine and unite any interest they may have in connection with the sale and transportation of said articles of commerce so that the prices thereof may effect advantageously to themselves; that all the claims of the plaintiff against the defendant in this action arise wholly out of and are in respect of sales of said articles of merchandise made between the 25th day of February, 1893, and the 30th day of June, 1896, to the defendant by the plaintiff in the ordinary course of its business as such a trust or combination, acting as aforesaid, and that this action is brought to recover the alleged price thereof and for no other purpose.

*Secondly.* That the plaintiff is and at all times since the 1st day of January, 1893, was a combination in the form of a trust in restraint of trade and commerce among the several States and doing business as such throughout the United States and between the States of Ohio and Illinois, contrary to the provisions of an Act of Congress of date July 2, 1890, and entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and that this action is brought solely to recover the price of articles of merchandise, to-wit, sewer and drainage pipes sold to the defendant by the plaintiff, then and there acting

and doing business as such a combination, as aforesaid, in violation of the provisions of said act.

*Thirdly.* That the plaintiff is and at all times since the 1st day of January, 1893, was a trust and doing business as such in the State of Illinois and elsewhere contrary to the provisions of an Act of the Legislature of the State of Illinois, entitled "An Act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdemeanors and prescribing punishment thereof and matters connected therewith, approved June 20, 1893; in force July 1, 1893;" that this action is brought solely to recover the price of articles of merchandise, to-wit, sewer and drainage pipes sold to defendant by plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defense to this action and the whole thereof.

XII.

The court erred in excluding testimony in reference to contracts for 200 carloads of sewer pipe between Camp & Thompson and Thomas Connelly and for 308 carloads for W. E. Dee, entered into before the formation of the Union Sewer Pipe Co., and admitted by the plaintiff, that the contract was assumed by it after its organization, and that it started to carry out the said contract, but never fulfilled the same according to the terms, for which breach of contracts the said Thomas Connelly and William E. Dee should have been allowed to set-off damages against the Union Sewer Pipe Company for the additional 5 per cent. he was compelled to pay by reason of the Union Sewer Pipe Company assuming the contract and failing to carry it out, and billing

the cars to him at such advance price, which was part of the money sought to be recovered from him by plaintiff in the case.

## XIII.

The court erred in denying the right of defendants to read cross-examinntion of witness Harry Thompson, called on behalf of plaintiff, as their own witness, who testified to a contract made by him with Thomas Connelly and William E. Dee, defendants, for 200 and 308 carloads respectively, which contract was subsequently assumed by the Union Sewer Pipe Company, and carried out by the said Company at an advance of 5 per cent. over the price contracted, notwithstanding that this witness was examined on the direct examination by attorneys for plaintiff touching all these points.

Witness Harry Thompson was called by plaintiff and examined among other things as to contracts Camp & Thompson made with Dee & Connelly for 308 and 200 carloads of sewer pipe respectively, prior to the formation of the Union Sewer Pipe Company. He admitted that the firm of Camp & Thompson made such contracts, and that they were turned over to the Union Sewer Pipe Company, when Camp & Thompson was absorbed or went into the agreement with said Company, and the said Company was to carry out all agreements of its constituent companies, of which it was advised, and he advised them respecting these contracts.

The court denied defendants the right to read the cross-examination of this witness, touching the matters brought out on direct examination, other direct examination was read, which cross-examination would show that the Union

Sewer Pipe Company only carried out these contracts at an advance of 5 per cent. over the price contracted.

VII.

That the court erred in its opinion instructing the jury to find and return a verdict for the plaintiff—was guilty of manifest error in the statement of facts and conclusions of law therein contained; and the defendant Dee specially and severally assigned as error that the jury was not sworn to try the issues between him and the said Union Sewer Pipe Company until the close of the case, and after the jury was instructed to find a verdict against him.

The defendant, William E. Dee, separately assigns as error that the court erred in permitting the plaintiff to prove the alleged amount of indebtedness from the defendant Dee, to the Union Sewer Pipe Company after the plaintiff had rested its case and after the defendant had closed his testimony and during the course of the rebuttal testimony of the plaintiff.

VIII.

That the verdict of the jury in said cause is contrary to law.

IX.

That the said court erred in rendering judgment against the defendants in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and the evidence as stated *in the pleadings* in said cause.

Assignments of error Nos. 7, 8 and 9 are argued in Assignment No. 6 under the court's instruction to the jury.

XIV.

The court erred in overruling the defendant's motion in arrest of judgment.

Wherefore, for these and other manifest errors, apparent on the face of the record in said cause, the defendants, Thomas Connelly and William E. Dee, plaintiffs in error herein, jointly and severally pray that the judgment of the said court may be reversed, and that such directions be given that full force and efficacy may inure to the defendants by reason of the defenses set up in their special notice of defenses and in their notice of set-off attached to and filed with their plea in this cause, and all amendments to such notices.

Each of the errors assigned is relied upon as a ground of reversal.

# BRIEF.

## I.

See argument, *infra*, p., p. 54-75.

The defendant in error is a pool, trust and combine directly and expressly contrary to and prohibited by the Illinois statutes, also the federal statutes and the common law.

*People vs. Sheldon*, 139 N. Y., 251.
*Judd vs. Harrington*, 139 N. Y., 105.
*Leonard vs. Poole*, 114 N. Y., 371.
*De Witt W. C. Co. vs. New Jersey, etc.*, 14 N. Y., Supp., 277.
*Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Pa. St., 173.
*Nester vs. Brewing Co.*, 161 Pa. St., 473.
*Salt Co. vs. Guthrie*, 35 Ohio St., 666.
*Emery vs. Candle Co.*, 47 Ohio St., 320.
*Hoffman vs. Brooks*, 11 Wkl. Law Bul., 258.
*Anderson vs. Jett*, 89 Ky., 375.
*Chapin vs. Brown*, 83 Iowa, 156.
*Craft vs. McConoughy*, 79 Ill., 346.
*Moore vs. Bennett*, 140 Ill., 69.
*Ford vs. Association*, 155 Ill., 166.
*Bishop vs. Preservers Co.*, 157 Ill., 284.
*People ex rel. vs. Exchange*, 170 Ill., 556.
*Association vs. Niezerowski*, 95 Wis., 129.
*Vulcan Powder Co. vs. Hercules*, 96 Cal., 510.
*Oil Co. vs. Adone*, 83 Tex., 650.
*Association vs. Rock*, 14 La. Ann., 168.

*Hilton vs. Eckersley*, 6 El. & Bl., 47.
*Urmston vs. Whiteleg*, 63 L. T. (U. S.), 455.
*Richardson vs. Buhl*, 77 Mich., 632.
*Arnot vs. Coal Co.*, 68 N. Y., 558.
*People vs. Milk Ex.*, 145 N. Y., 267.
*People vs. Refining Co.*, 54 Hun., 366.
*State vs. Neb. Dist. Co.*, 29 Neb., 700.
*State vs. Standard Oil.*, 49 Ohio St., 137.
*Mfg. Co. vs. Klotz*, 44 Fed., 721.
*Distilling Co. vs. People*, 156 Ill., 448.
*Carbon Co. vs. McMillin*, 119 N. Y., 46.
*Harrow Co. vs. Hench*, 83 Fed., 36.
*Factor Co. vs. Adler*, 90 Cal., 110.
*Lumber Co. vs. Hayes*, 76 Cal., 387.
*Davies vs. Davies*, 36 Ch. Div., 359.
*Egerton vs. Earl Brownlow*, 4 H. L. Cas. 1 (Bridgewater case).
Beach on Monopolies and Trusts.
*United States vs. Trans-Missouri Freight Assn.*, 166 U. S., 290.
*United States vs. Addyston Pipe & Steel Co., et al.*, 85 Fed. Rep., 271.
Cook on Corporations, Sections 503 *a*, *b*, *c* and *d*, and cases cited in foot notes.

Where parties are engaged in *quasi* public employment, see:

*Gibbs vs. Gas Co.*, 130 U. S., 396.
*People vs. Gas Co.*, 130 Ill., 268.
*Stockton vs. Railroad*, 50 N. J. Eq., 52.
*West Va. vs. Pipe Line*, 22 W. Va., 600.
*Hooker vs. Vandewater*, 4 Denio, 349.
*Stanten vs. Allen*, 5 Denio, 434.

*Railroad Co. vs. Collins*, 40 Ga., 582.
*Hazelhurst vs. Railroad Co.*, 43 Ga., 13.

II.

Foreign corporations doing business in Illinois are subject to the same liabilities, restrictions and duties as domestic corporations and cannot exercise greater power, or enforce rights, although within charter powers, which were not granted by the laws of this State to similar corporations.

The defendant in error is a foreign corporation doing business in Illinois and amenable to the laws of the State.

See argument *infra*, p, p. 76-80.

1 Starr & Curtiss, Illinois Statutes, p. 1017.
*Farmers L. I. Co. vs. Lake St. Ry.*, 173 Ill., 439.
*Stevens vs. Pratt*, 102 Ill., 206.
*Penn. Ins. Co. vs. Banerle*, 143 Ill., 459.
*Rhodes, et al., vs. Missouri Co.*, 173 Ill., 621.
*Pope vs. Hanke*, 155 Ill., 617.
*Walters vs. Whitlock*, 9 Fla., 86.
Story on Conflict of Laws, Sec. 527.
*Faulkner vs. Hymen*, 142 Mass., 53.
*Hill vs. Spear*, 50 N. H., 253.
*Fisher vs. Lord*, 63 *Id.*, 514.
*Phinney vs. Baldwin*, 16 Ill., 108.
*Mumford vs. Kanty*, 50 Ill., 370.
*Evans vs. Anderson*, 78 Ill., 558.
*Anstedt vs. Sutter*, 30 Ill., 164.
*Yeatman vs. Cullen*, 5 Blackf., 240.
*Woodruff vs. Hill*, 116 Mass., 310.

*a.* By a long series of decisions it has been fully established that through an exercise of comity foreign corpora-

tions will be recognized and allowed to enforce their rights in a State except *so far as State statutes or clear public policy of the State prohibit it.*

*Clark vs. Cent. R. & B. Co.*, 50 Fed. Rep., 338.

*Beveridge vs. Hewitt*, 8 Ill. App., 467.

*Cothran vs. Ellis*, 125 Ill., 496.

*Irwin vs. Williar*, 110 U. S., 499.

*Phinney vs. Baldwin*, 16 Ill., 108.

*Chewning vs. Johnson*, 5 La. Ann., 678.

*Greenwood vs. Curtin*, 6 Mass., 358.

*Mumford vs. Canty*, 50 Ill., 375.

*Mandel vs. Swan*, 154 Ill., 177.

*Warren vs. Bank of Columbus*, 149 Ill., 9.

*Granite, Slate, etc., vs. Lloyd*, 48 Ill. App., 429.

*Santa Clara vs. Sullivan*, 116 Ill., 275.

*Barnes vs. Suddard*, 117 Ill., 237.

Story's Conflict of Laws (7th Ed), Vol. 2, pp. 567 to 571.

*b.* That a corporation is a person within the constitutional guaranty of equal protection of the laws, but is not a citizen within the guaranty of equal privileges and immunities. See note to *Louisville Safety Vault & T. Co. vs. Louisville & N. R. Co.* (Ky.), 14 L. R. A. 580-585.

Guthrie on the 14th Amendment to the Constitution of the U. S., page 53.

*I. C. R. R. Co. vs. Bloomington*, 76 Ill., 477.

*c.* Corporations created within the State are amenable to the police power of the State to the same extent as natural persons.

*Ruggles vs. The People*, 91 Ill., 256.

*d.* A citizen of one State going into another, is entitled, under the Federal Constitution, to no greater privileges and immunities than are possessed by the citizens of that State.

*Detroit vs. Osborne*, 135 U. S., 492.

III.

The Illinois anti-trust laws of 1891, and the amendatory act of 1893, is constitutional, and not class and special legislation in contravention of the Federal and State Constitutions.

See Argument, *infra*, p., p. 81-87.

*Ford vs. Milk Shippers' Assn.*, 155 Ill., 166.

*Harding vs. American Glucose Co.*, 182 Ill., 551.

*Re Oberg, Oregon Sup. Court*, 14 L. R. A., 577.

*State vs. Main* 16 Wis., 398.

*Minneapolis, etc., Ry. vs. Herrick*, 127 U. S., 210.

*Missouri Pac. vs. Humes*, 115 U. S., 512.

*Wurts vs. Hoagland*, 114 U. S., 606.

*Dow vs. Beidelman*, 125 U. S., 680.

*Missouri vs. Lewis*, 101 U. S., 22.

Followed by

*Sullivan vs. Hang*, 82 Mich., 548.

*Covington, etc., Turnpike Co. vs. Sandiford*, 164 U. S., 578.

*New York, etc., vs. New York*, 165 U. S., 628.

*New York, etc., vs. Bristol*, 151 U. S., 556.

*Ames vs. Union Pac.*, 64 Fed. Rep., 165.

*Brass vs. North Dakota*, 153 U. S., 391.

*Lowe vs. Kansas*, 163 U. S., 81.

*Duncan vs. Missouri*, 152 U. S., 377.
*Minn. vs. Illinois*, 94 U. S., 113, 69 Ill., 80.

*a.* Equal protection cannot be said to be denied whenever the law operates alike upon all persons and property similarly situated.

*Walston vs. Nevin*, 128 U. S., 578.
*State vs. Schlemmer*, 42 La. Ann., 1166.
*State vs. Moore*, 104 N. C., 714.
*Ex parte Swaim*, 96 Mo., 44.
*Barbier vs. Connelly*, 113 U. S., 32.
*Hoon Sing vs. Crowley*, 113 U. S., 709.

*b.* Legislation limited as to objects or territory does not infringe on the constitutional right of equal protection where all persons subject to it are treated alike, under like circumstances and conditions.

*Hayes vs. Missouri*, 120 U. S., 68.
*Minneapolis & St. Louis Ry. vs. Beckwith*, 129 U. S., 26.

*c.* The sale of goods by a foreign corporation within the State and sent from another State is an act of interstate commerce.

*Cook vs. Rome Brick Co.*, 98 Ala., 409.

## IV.

Because one section of an act is unconstitutional, it does not follow that the other sections of the same act, which are within the power given by the Constitution, should not be enforced.

See argument, *infra*, p., p. 88-90.
*Nelson vs. People*, 33 Ill., 390.
*Donnerberger vs. Prendergast*, 128 Ill., 229.

*The People vs. Reformatory*, 148 Ill., 426.
*Belleville vs. Railway*, 152 Ill., 188.
*Keokuk Co. vs. Keokuk*, 95 U. S , 80.
*Unity vs. Burrage*, 103 U. S., 459.
*Presser vs. Illinois*, 116 U. S., 252.
Also all the State and Federal decisions cited on p. 1088, Vol. VI, of American and Eng. Ency. of Law.

a See Penniman's case, 103 U. S., 714.
*Hills vs. Exchange Bank*, 105 Id., 319.
*Unity vs. Burrage*, 103 Id., 447.
*Florida Central Railroad Co. vs. Schutte*, Id., 118.
*Edwards vs. Pope*, 3 Scam., 465.
*People ex rel. vs. Cooper et al.*, 83 Ill., 585.
*Hinz vs. People ex rel.*, 92 Id., 406.

b *Van Horne vs. Dorrance*, 2 Dall. (U. S.), 309.
*Calder vs. Bull*, 3 Dall. (U. S.), 386.
*Fletcher vs. Peck*, 6 Cranet (U. S.), 87.
*Cooley's Court Lim.*, 182.
*Ogden vs. Sanders*, 25 U. S., 12 Wheat., 270.
*Clark vs. Rochester*, 24 Barb., 471.

V.

Federal courts. State laws as rule of decison. Decisions binding.

*Burgess vs. Seligman*, 107 U. S., 33.

## VI.

Exercise of the power of annulment only in cases where it is impossible to dispose of a cause on its merits.

*Ex p. Randolph*, 2 Brock (U. S.), 447.

Also foot notes on page 1084, Vol. VI, Am. & Eng. Ency. of Law.

## VII.

Other questions involved. Set-offs and counter-claims going to merits of the case stricken out on motion of defendant in error.

See argument, *infra*, p., p. 92-95.

*a.* Where defendant in an action seeks to recoup damages from plaintiff for breach of contract, it is immaterial that the damages alleged are unliquidated.

*Harlan vs. St. Paul Ry.*, 31 Minn., 427.

*Ward vs. Fellers*, 3 Mich., 281.

*Batterman vs. Pierce*, 3 Hill (N. Y.), 172.

15 Am. & Eng. Ry. Cases, 130.

*b.* On the trial of such a case it stands as though two separate suits were brought to determine rights of parties—in reality two suits are pending to be tried at same time.

*Merchants Bank vs. Schulenberg*, 54 Mich., 49.

*Francis vs. Edwards*, 77 N. Car., 271.

*c.* Where counter-claim is pleaded and raises issue of fact, issues should be tried by a jury, and a motion by plaintiff for judgment on the pleadings should be refused.

*Wilson vs. Hughes*, 94 N. Car., 182.

VIII.

Amendment of pleadings when necessary to present an issue on the merits, not discretionary, but a legal right.

Revised Statutes of Illinois, p. 144.
*Fontaine vs. Baxley*, 90 Ga., 416.
*Davis vs. Bean*, 114 Mass., 358.
*Powell vs. Love*, 36 W. Va., 97.
*McHardy vs. Wadsworth*, 8 Mich., 349.
*Drake vs. Drake*, 83 Ill., 526.
*Shufeldt vs. Fidelity Bank*, 93 Ill., 597.
*Kirkpatrick vs. Cooper*, 77 Ill., 565.
*Empire Co. vs. Trust Co.*, 1 Ill. App., 391.

IX.

Defendant in error should not have been allowed to prove the indebtedness of William E. Dee after it had closed its direct case, and on rebuttal.

X.

The exclusion of testimony offered by plaintiff in error—the deposition of the attorney-general of the State of Ohio.

See Argument, *infra*, p., p. 98 to end.

XI.

In conclusion of argument.

See Argument, *infra*, p. 98.

Compare contract in case at bar (Rec., p. 397; Trans., p. 128) with that held in restraint of trade in *United States vs. Addyston Pipe & Steel Co.*, Vol. 85, Fed. Rep., 271.

# ARGUMENT.

## I.

THE DEFENDANT IN ERROR, THE UNION SEWER PIPE COMPANY, IS A POOL, TRUST AND COMBINE DIRECTLY AND EXPRESSLY CONTRARY TO AND PROHIBITED BY THE ILLINOIS STATUTES, ALSO THE FEDERAL STATUTES, AND THE COMMON LAW.

MAY IT PLEASE THE COURT:

The evidence in this case shows facts and circumstances proving the defendant in error, and all its constituent Companies in the operation of a business which was a pool and combination of ten different Companies organized under the laws of the State of Ohio, in gross and flagrant violalation of every principle of the common law in relation thereto, and of the Federal statutes, and of every single provision of the anti-trust statutes of the State of Illinois above referred to. (Trans., p. 85; Rec., p. 217.) All these facts and circumstances are practically admitted by counsel for defendant in error to be absolutely true. (Trans., p. 145; Rec., p. 492.)

The organization and purpose of the Union Sewer Pipe Company is told by Byron W. Robinson, secretary of the said Company since 1893. (beginning on page 193 transcript; Rec., p. 606.)

Mr. Robinson testified: "Standard Akron Pipe" is a name long known to the trade; it has virtues over pipe of other manufacturers, being more impervious to moisture, more vitreous in texture and more uniformly good in quality than that made by others. It is made of a shale

first found at Sharon, Pennsylvavia. "It is a deposit of clay impregnated with iron. It is characteristic of the clay used by the Akron Companies."

"Ten companies manufacturing Standard Akron pipe entered into the contract with the Union Sewer Pipe Company." (Trans., p. 196; Rec., p. 610.) "After entering into contract with Union Sewer Pipe Company for the sale of their product, the different companies prosecuted their work as before. There was large increase in output after contract. (Trans., p. 197; Rec., p. 611.) There was no competition on Standard Akron Pipe after we entered into contract; we had the market all to ourselves." (Trans., p. 207; Rec., p. 631.)

"I was a stockholder in the Union Sewer Pipe Company; held four shares. The authorized capital was $20,000 divided into 200 shares; $2,800 of the stock was subscribed for, and $280 paid in." (Trans., p. 208; Rec., p. 632.)

"All the stockholders of the Union Sewer Pipe Company were stockholders of the constituent companies; that is, there was nobody in the Union Sewer Pipe Company except men who were connected with its constituent companies." (Trans., p. 209; Rec., p. 633.)

The purpose of this organization is told frankly by David E. Hill, the first president of the Union Sewer Pipe Company (on p. 63 of Transcript; Rec., p. 114); "I thought it was to the interest of all concerned to subscribe." "It was to the interest of the manufacturers because they saved money by the association. * * * Their expenses were far less combined than they were separate." "When the shops were separate they had to send out as many as four-

teen traveling men, while when they were combined they sent out only half that many; and, furthermore, it took less bookkeeping and saved office expenses."

Concerning the output of the corporations constituting the Union Sewer Pipe Company in 1893—at the time of its formation, Horace B. Camp testifies: "The yearly capacity of these corporations and firms was about 8,000 carloads of pipe at an approximate value of $75 a carload, making approximately a value of $600,000." (Trans., p. 76; Rec., p. 204.)

Then, again, concerning the purpose of the formation of the Union Sewer Pipe Company, the same witness testified:

"Q. Is it not a fact that you gentlemen, representing these different corporations and firms, agreed among yourselves previously to the incorporation of the Union Sewer Pipe Company as a corporation, that you would pool your interest and work through that Union?

"A. That is what our Companies contracted to do." (Trans., p. 77; Rec., p. 205.)

Taking the foregoing in connection with the contract these corporations entered into with the Union Sewer Pipe Company (Transcript, p. 128; Rec., p. 397) binding themselves to sell to the said Company all the sewer pipe on hand on the 15th day of February, 1893, and all they manufactured from the said date until the 31st day of December, 1900, and the other provisions of said contract, can it be successfully disputed that this $20,000 corporation, with a subscribed capital of $2,800 and a paid in capital of $280, was anything more than a pool or combine of the manufacturers of Akron sewer pipe for the purpose of controlling the market, stifling competition and defeating justice?

The effect of this combination on prices was that dealers were compelled to pay 5 per cent. more for pipe than before the formation of the Union Sewer Pipe Company, but while there is a conflict of testimony as to whether or not there was an advance in prices, *the undisputed fact remains that the tendency of prices was downwards and the Union Sewer Pipe Company kept the prices stationary.* (Trans., p. 118; Rec., p. 48.) This, however, is immaterial in a discussion of this case, as the courts have repeatedly held that it is not necessary to show that competition was in fact destroyed, or prices unreasonably advanced. It is enough to know that the inevitable tendency of such combinations is injurious to the public.

The contract between the Union Sewer Pipe Company and its constituent companies (Rec., p. 397; Trans., p. 128) furnish the evidence and purpose of the organization of the corporate body, and the object of its organization is to be determined by that instrument.

From this contract it will be found that there are reciprocal relations between the Union Sewer Pipe Company and its ten constituent companies, which may be summarized as follows: Defendant in error's corporate existence is recognized and admitted by all constituent companies; it agrees to buy all the product they have on hand; they in return agree to sell to it all the pipe they manufacture from 15th day of February to the 31st day of December, 1900, thus cornering the market for the commodity known as standard Akron pipe for the said period. The contract then parcels off among the constituent companies the percentage of orders each company shall receive; the contract fixes the price each company shall receive on orders distributed as aforesaid, and in case of over production the

constituent companies shall be penalized by having their stock taken at a reduced price; that the contracts are entered into with the understanding that similar contracts have been entered into and will be entered into with other manufacturers; that the standard and size of pipe shall be fixed by defendant in error, and after the expiration of contract, constituent companies are at liberty to buy back all pipe on hand, etc.

The foregoing, taken in connection with evidence, discloses that the object of the organization of the Union Sewer Pipe Company was to control the price of, and the purchase and sale of, standard Akron sewer pipe throughout the United States, and this action was carried out by the concurrent action of the members and the Company; by the action of the Union Sewer Pipe Company on the one part, aided by the agreement of its members, who by assenting to such an organization and entering into such an agreement, carry out a scheme which is a combination, agreement or trust, by which they fix the price of an article of merchandise and limit the production and the quantity to be sold throughout the United States. It is clearly a combination in violation of the statute of Illinois and in restraint of trade, and in violation of the Federal statutes, inasmuch as in the case at bar there is a sale of goods by a foreign corporation within the State, and sent from another State, and therefore an act of interstate commerce to which the Federal statutes applies.

And in support of this proposition I cite the following authorities:

In *People vs. Sheldon*, 139 N. Y., 251, 34 N. E. 785, all the coal dealers in the city of Lockport, N. Y., entered into a contract of association, forming a coal exchange to

prevent competition by constituting the exchange the sole authority to fix the price to be charged by members for coal sold by them, and the price was thus fixed. The court approved a charge to the jury that even if this was merely a combination between independent coal dealers to prevent competition between themselves for the due protection of the parties to it against ruinous rivalry, and although no attempt was made to charge unreasonable or excessive prices, it was inimical to trade and commerce, whatever might be done under it, and was within the state statute making a conspiracy injurious to trade indictable. Said Andrews, C. J. (page 264, 139 N. Y., and page 789, 34 N. E.):

> "If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

See, to the same effect, *Judd vs. Harrington*, 139 N. Y., 105; *Leonard vs. Poole*, 114 N. Y., 371; *De Witt Wire-Cloth Co. vs. New Jersey Wire-Cloth Co.* (Com. Pl.) 14 N. Y. Supp., 277.

In *Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Pa. St., 173, five coal companies controlling the bituminous coal trade in Northern Pennsylvania agreed to allow a committee to fix prices and rates of freight, and to fix proportion of sales by each. Competition was not destroyed, because the anthracite coal and Cumberland bituminous coal were sold in competition with this coal. The association was, nevertheless, held void, as in illegal restraint of

trade and competition, and tending to injure the public. In *Nester vs. Brewing Co.*, 161 Pa. St., 473, forty-five brewers in Philadelphia made an agreement to sell beer in Philadelphia and Camden at a certain price to be fixed by a committee of their number. Though beer could hardly be said to be an article of prime necessity like coal, yet, as it was an article of merchandise, the contract was held void, as in restraint of trade, and tending to a monopoly.

In *Salt Co. vs. Guthrie*, 35 Ohio St., 666, the salt manufacturers of a salt producing territory in Ohio, with some exceptions, combined to regulate the price of salt by preventing ruinous competition between themselves, and agreed to sell only at prices fixed by a committee of their number. The Supreme Court of Ohio held the contract void. Judge McIlvane, who delivered the opinion of the court, said:

> "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on the ground of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public."

Other Ohio cases which presented similar facts, and in which the same rule was enforced, are *Emery vs. Candle Co.*, 47 Ohio St., 320, and *Hoffman vs. Brooks*, 11 Wkly. Law Bul., 258.

In *Anderson vs. Jett*, 89 Ky., 375, two owners of steamboats running on the Kentucky river made an agreement to keep up rates, and divide net profits, to prevent ruinous competition and reduced rates. The contract was held void.

In *Chapin vs. Brown*, 83 Iowa, 156, 48, the grocerymen in a town, in order to avoid a trade in butter which was burdensome, agreed not to buy any butter or to take it in trade except for use in their own families, so as to throw the business into the hands of one man who dealt in butter exclusively. The agreement was held invalid, because in restraint of trade, and tending to create a monopoly.

In *Craft vs. McConoughy*, 79 Ill., 346., five grain dealers in Rochelle, Ill., agreed to conduct their business as if independent of each other, but secretly to fix prices at which they would sell grain, and to divide profits in a certain proportion. This was held void, as in restraint of trade, and tending to create a monopoly. In *More vs. Bennett*, 140 Ill., 69, articles of association entered into by only a part of the stenographers of Chicago to fix a schedule of prices, and prevent competition among their members and a consequent reduction of prices, was held void. The court said:

> "A combination among a number of persons engaged in a particular business to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would be if left to the influence of unrestricted competition, is contrary to public policy. Contracts in partial restraint of trade which the law sustains are those entered into by a vendor of a business and its good will with its vendee, by which the vendor agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased."

In *Association vs. Niczerowski*, 95 Wis., 129, the suit was on a note given in pursuance of the secret rules of an

association of 60 out of the 75 master masons in Milwaukee, by which all bids for work about to be let were first made to the association, and the lowest bidder was then required to add 6 per cent. to his bid, and, if the bid was more than 8 per cent. below the next lowest bidder, more than 6 per cent. might be added. Each member was required to pay to the association 6 per cent. of his estimates when due, for subsequent distribution. In declaring the contract void, the court said:

> "The combination in question is contrary to public policy, and strikes at the interests of those of the public desiring to build, and between whom and the association or the members thereof there exists no contract relations."

In *Vulcan Powder Co. vs. Hercules Powder Co.*, 96 Cal., 510, four powder companies of California agreed that each should sell at a price to be fixed by a committee of their representatives, and should pay over to the others the profits on any excess of sales over a fixed proportion of the total sales. The contract was held void.

In *Oil Co. vs. Adoue*, 83 Tex., 650, five owners of cotton-seed oil mills in Texas made an agreement not to sell at less than certain agreed prices. One guaranteed profits to the four others, and suit was brought on the guaranty. It was held void, as restraining trade, and tending to a monopoly, even though the evidence failed to establish that it effected a monopoly.

In *Association vs. Kock*, 14 La. Ann., 168, eight commercial firms in New Orleans holding a large quantity of cotton bagging entered into an agreement by which they stipulated that for three months no member should sell a bale except by a vote of the majority. It was held that

the contract was "palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

In *Hilton vs. Eckersley*, 6 El. & Bl., 47, it was held that an agreement between 18 cotton manufacturers to submit to the control of a committee of their number for 12 months the question as to prices to be paid for labor and the terms of employment, in order to resist the aggressions of an association of workingmen, was void and unenforceable, because in restraint of trade.

In *Urmston vs. Whitelegg*, 63 L. T. (N. S.), 455, a case in the queen's bench division, before Day and Lawrence, JJ., the action was brought to enforce a penalty under the rules of the Bolton Mineral Water Manufacturers' Association, which recited that the object of the association was to maintain the price of mineral water, and bound the members for 10 years not to sell at less than 9d. a dozen bottles, or at not less than any higher price fixed by the committee, on penalty of £10 for each violation. Day, J., said:

> "If a contract for raising prices against the public interest is a contract in restraint of trade, this is undoubtedly such a contract. During the last hundred years great changes have taken place in the views of the public, of the legislature, and therefore of the judges, on the matter, and many old-fashioned offenses have disappeared; but the rule still obtains that combination for the mere purpose of raising prices is not enforceable in a court of law. This contract is illegal in the sense of not being enforceable. It is not necessary that it should be such as to form the ground of criminal proceedings."

In the foregoing cases the only consideration of the

agreement restraining the trade of one party was the agreement of the other to the same effect, and there was no relation of partnership, or of vendor and vendee, or of employer and employe. Where such relation exists between the parties, as already stated, restraints are usually enforceable if commensurate only with the reasonable protection of the covenantee in respect to the main transactions affected by the contract. But, in recent years, even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step further than those already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose. The principal cases of this class are

*Richardson vs. Buhl*, 77 Mich., 632, p. 43.
*Arnot vs. Coal Co.*, 68 N. Y., 558.
*People vs. Milk Exchange*, 145, N. Y., 267.
*People vs. Refining Co.*, 54 Hun., 366.
*State vs. Nebraska Distilling Co.*, 29 Neb., 700.
*State vs. Standard Oil Co.*, 49 Ohio St., 137, and other cases cited under "Point I" of Brief.

In addition to the cases cited, there are others which sustain the general principle, but in them there exists the additional reason for holding the contracts invalid that the parties were engaged in a *quasi* public employment. They are *Gibbs vs. Gas Co.*, 130 U. S., 396, and other cases cited at end of "Point I" of Brief.

Public policy is a variable quantity. It must vary, and does vary, with the habits, capacities and opportunities of the public.

*Davies vs. Davies*, 36 Ch. Div., 359.

"There certainly is a large class of decisions which will be found collated in the report of the recent Bridgewater case in the House of Lords, to the effect that if a contract or will is, in the opinion of the judges before whom it comes in suit, clearly contrary to public policy, so that by giving effect to it the interests of the public would be prejudiced, it is to be adjudged void."

*Hilton vs. Eckersley*, 6 E. & B., 47.

(*Egerton vs. Earl Brownlow*, 4 H. L. Cas., 1, is the Bridgewater case.)

Public policy is that which is best for the common good of the community.

Bridgewater case, *supra*.

The forms in which the monopolistic agreements are made is immaterial; the courts will not regard mere forms or permit subterfuge to thwart protection of public interests.

*Craft vs. McConoughy*, 79 Ill., 346.

In case of an agreement resulting in an actual monopoly, the essential tendency of which is to suppress competition,

the extent of space or duration of time within which it is designed to operate is unimportant.

Spelling 93, citing *Texas Standard Oil Co. vs. Adour*, 19 S. W., 274.

Courts will take judicial notice of the effect of carrying out a contract whose object is the suppression of competition which is necessary and useful to the public, and it is not necessary that the monopoly appear from the express terms of the contract.

*Id.*, 94, 95, citing *More vs. Bennett*, 140 Ill., 69.

Also, *Chaplain vs. Brown* (Iowa), 48 N.W., 1074.

*Texas Standard Oil Co. vs. Adour, supra.*

Where corporations form a trust amounting in legal effect to a co-partnership, their acts in entering into it are contrary to public policy.

Spelling, 180.

The question in construing such contract is not what mischief has been done, but what may be done.

*Id.*, 182, citing cases.

Then follows on pages 19 to 21 inclusive, review of the cases from the earliest date down, in support of the above propositions.

Then on pages 21 to 24 inclusive, is found a review of the cases as to partial restraint of trade, closing on page 24 with the statement that "such is a *resume* of the history of the common law doctrine as to restraint of trade."

Then follows on pages 24–27, review of English equity decisions.

In America the question is the reasonableness of the restraint *in view of the public interest.*

*Id.*, 28.

*At present there is a strong tendency to restrict the right of restraint as shown in recent statutes and decisions, both Federal and State.*

*Id.*, *Ib.*

The Federal statute makes all contracts, combinations, etc., in restraint of trade, etc., and every attempt at monopoly, etc., crime.

*Id.*, *Ib.*

For definitions and discussions of public policy and changes therein, with citation of cases, please see *Id.*, page 37 *et seq.*

However definitions may differ, "This rule may be safely laid down, that wherever any contract conflicts with the morals of the times or contravenes any established interest of society it is void as being against public policy."

*Id.*, 43, citing Story on Contracts, section 675.

**Where the Legislature has indicated a policy of the State that is the rule for the courts.** In the absence of such a guide the latest decisions in equity will be followed.

*Id. Ib.*, 46–47, citing cases.

*When a contract in restraint of trade falls under a statutory provision, such statute settles all questions of public policy and reasonableness.*

(*Id.*, 145–146.)

Illinois statute in relation to pools, trusts, etc., referred

to with the statement that it has served as a model for legislation in other States.

*Id.*, 284–285.

Conspiracies in restraint of trade are under some statutes crimes, and under others misdemeanors.

*Id.*, 246–247.

(NOTE.—Illinois statutes makes it a misdemeanor, punishable by fine and imprisonment, and declares contracts void in violation thereof.)

Principle upon which contract in restraint of trade are held invalid, stated.

*Id.*, 107–108, citing cases.

All restraints presumed bad, but, if facts shown, court will reach its conclusion from them.

*Id.*, same foot note.

All general restraints are void, as are also all unreasonable partial restraints.

*Id.*, 142.

Not only are railroads, telegraph, telephone and gas companies engaged in public business which may be regulated by statute, but the business of bread baking and laundry and others of like character, are of public nature and the State has the power to regulate all corporations engaged in such. *Id.* 412, *et seq.*, particularly sections 144-145.

Is not the making and sale of sewer pipe as much of a public or *quasi* public character as the baking business or laundry business?

Chapter 11, Beach on Monopolies and Trusts, beginning

at page 503, relates to industrial trusts, and Chapter 12, beginning at page 543, relates to trust combinations.

Please see particularly Sections 174 and 175 as to monopoly under patents, to the effect that while a patent is a grant of a monopoly for the manufacture and sale of the article patented *it confers no power or right of illegal combinations or pools, etc.*, citing *National Harrow Company vs. Hench*, 76 Fed. Reporter, 667–669, and many other cases.

Such combinations are as obnoxious to the public interest as if the parties were dealing in unpatented articles.

*National Harrow Company vs. Hench, supra,*
cited by Beach on page 577.

For a review of the anti-trust legislation of the different States and the United States, see Chapter 13, beginning on page 599, giving the statutory provisions.

For the opinion of U. S. Supreme Court on subject, see *United States vs. Trans-Missouri Freight Association*, 166 U. S., p. 290, beginning at the fourth line before the end of page 322.

And on page 337, in quoting from and approving the opinion of Justice Shiras, in same case in Circuit Court of Appeals, the Supreme Court say:

> "Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; *yet balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world.*"

See *United States vs. Addystone Pipe & Steel Co. et al.*, 85 Fed. Rep., 271.

**The Policy of Illinois as to Combines, Pools and Trusts.**

The anti-trust statute of Illinois approved June 11, 1891, and in force July 1st, 1891, as amended in 1893, is found on pages 1252 to 1255, inclusive, of volume 1 of Starr & Curtis statutes. (They are set out in Transcript, page 249; also such parts as are material for this discussion in this brief and argument).

The act to define trusts and conspiracies against trade, etc., approved June 20, 1893, and in force July 1st, 1893, is found on pages 1256 and 1557 of the same volume.

The Amendment of 1897 to the Act of 1891, is found in the laws of 1897, on page 153.

Many decisions of Illinois Appellate and Supreme Courts, constructing these statutes and enforcing them, and also determining the principles of the common law applicable to pools, trust and combines in this State are already cited and quoted from in the brief and argument in this cause.

It will be seen that the State of Illinois both in its statutes and its decisions, has taken and adhered to an advance position against restraints of trade, and against pools, trusts and combines to control trade, to regulate and control prices, etc.

As showing the policy in this State please see *Chicago Gas Light Co. vs. Peoples Gas Light Co.*, 121 Ill., pages 545 and 546.

Please see also cases there cited by court and counsel.

Efforts to prevent competition by restraining individual efforts and freedom of action in trade and commerce, are hostile to public welfare, not consonant with the spirit of our institutions, and in violation of law. *The People ex rel., etc., vs. The Chicago Live Stock Exchange*, 170 Ill., 556.

Whatever tends to create a monopoly is unlawful as being contrary to public policy. *Id. Ib.*, and cases cited.

An agreement providing for the welding together of all the interests of a certain business into one giant combination or partnership, under the absolute dominion and control of a board of trustees, is void as contrary to public policy. *Bishop, etc., vs. American Preservers' Co.*, 157 Ill., 284.

A corporation cannot enter into a partnership. *Id. Ib.*

A foreign corporation in so far as it is doing business in Illinois is subject to the same restrictions and duty as corporations formed in this State. *Id. Id.*

We refer to the opinion in the above case as a part of this brief and argument in support of plaintiffs in error.

Also the case of *The Distilling and Cattle Feeding Co. vs. People ex rel., etc.*, 156 Ill., 448.

We quote the language of the Supreme Court of Illinois in *Ford et al., vs. The Chicago Milk Shippers Association*, 155 Ill., 166, pp. 179-180, as follows:

> "It is urged that the corporation cannot *alone* enter into a trust or combination that would be a violation of this statute. Whilst it is true, as a general proposition that a corporation may be created and constituted a legal entity, existing separate and apart from the natural persons composing it, yet it connot act independently, or against the will, or abstain from comply-

ing with the direction of the natural persons who constitute the corporate body. A corporation is, in fact, an association of persons united in one body, having perpetual succession, vested with political rights conferred upon it by the authority creating it. (Morawetz on Corp., Sec. 227; I Kyd. on Corp., p. 13). Such being the nature of the corporate body, *acts done by it are the acts of the associated person*, as corporators or as individuals, and in which capacity the act is done must be determined from the nature and character of the act, and the purpose for which the corporation was organized. (*State ex rel. vs. Standard Oil Co.*, 149 Ohio, p. 137). And when the acts of the corporate body are in violation of the statutes of the State, *and would be a misdemeanor* that would subject it to punishment in accordance with law, such acts are wholly without the lawful power of the corporation, as the State will create nobody with authority to violate its laws. *And where, in the organization of the corporate body or the control exercised by the stockholders in determining the agencies selected for managing its business*, THE BUSINESS AS THUS CONDUCTED, MANAGED AND CONTROLLED IS AGAINST PUBLIC POLICY OR IN CONTRAVENTION OF THE STATUTES OF THE STATE. **such acts of the corporate body and of the individual shareholders are the combined acts of all, and courts are not so powerless that they may not prevent the success of ingenious schemes to evade or violate the law.** *There can be no immunity for evasion of the policy of the State*, by its own creation. The corporation, as an entity, may not be able to create a trust or combination *with itself*, BUT ITS INDIVIDUAL SHAREHOLDERS MAY, IN CONTROLLING IT, TOGETHER WITH IT, CREATE SUCH TRUST OR COMBINATION THAT WILL CONSTITUTE IT, WITH THEM, ALIKE GUILTY."

Could any language possibly be more pertinent, or more forcible, in this case than that above quoted from the opinion of this court?

In concluding our argument on this question we beg leave to refer the court to Sections 503a, 503b, 503c and 503d, of the edition just published, of Cook on Corporations and the cases there cited in the foot-notes.

We quote a portion of these sections here:

"The purpose of the 'trust' is to control prices, prevent competition, and cheapen the cost of production. The Standard Oil Trust, The American Cotton-seed Oil Trust, and the Sugar Trust were examples of this method of combination." (Page 910.)

"But the word 'trust' has a wider and more popular meaning. It is used to designate any combination of producers for the purpose of controlling prices and suppressing competition. In this sense of the word, all contracts, agreements and schemes whereby those who were competitors combine to regulate prices are 'trusts.'"

"The courts have held with great uniformity that these combinations are illegal *if their purpose is to restrict production, raise prices, or restrain trade.* The law is clear that any combination of competing concerns *for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy and is void. This principle of law has been applied with great rigor to trusts*, the recent combinations in trade. The two leading cases on the subject are the Sugar Trust decision in New York and the Standard Oil Trust decision in Ohio many cases showing the different circumstances under which the rule has been applied are given in the notes below, arranged in the alphabetical order of the various States." (Pages 911-912.)

"These cases indicate the complicated questions and im-

portant litigation that have arisen by reason of the trusts. It is believed, however, that the volume of such litigation will decrease rather than increase in the future." (Pages 912-913.)

(NOTE: Why does this author express this as his opinion unless he thinks that trust promoters, educated by numerous adverse decisions as they have been, have at last hit upon a plan, namely, by chartering gigantic corporations in New Jersey, to evade and defeat, for the future, the settled policy of the other States, as declared by their statutes and decisions. The author certainly does not base such opinion on any supposition that trusts and trust promoters are dead, as they are certainly becoming more numerous and more powerful daily.)

We quote further from Cook, as follows: "Most of the great trusts have been *driven* from their original mode of organization and have reorganized *by conveying all their property to a corporation organized for the purpose of taking over the property.* Such has been the case with the Sugar Trust and the Cotton Seed Oil Trust. The dicisions of the New York Court of Appeals against the Sugar Trust, and the Supreme Court of Ohio against the Standard Oil Trust, have convinced the trusts that their original *mode* of organization was illegal *and must be abandoned.* The result has been that *the trusts* for the most part *have reorganized* AND REAPPEARED IN THE FORM OF GIGANTIC CORPORATIONS. *How far the law will interfere with this class of corporations remains to be seen.* In the Chicago Gas Company case the Supreme Court of Illinois, forfeited the charter of the Company *on the ground that it was formed to bring about an illegal combination. New Jersey, on the other hand, grants broad charters to the combinations*

AND RECEIVES A HEAVY TOLL FOR THE PRIVILEGES AND IMMUNITIES GRANTED. *The past five years have changed but little the status of the whole question.*" (Pages 914-919.)

"The Supreme Court of the United States has declared illegal railroad pooling contracts as being contrary to the anti-trust Act of Congress of 1890. But aside from this, THE LAW HAS INTERFERED BUT LITTLE WITH THESE GREAT COMBINATIONS."

It thus appears that trust promotors have been driven from Illinois, and most of the other States, to seek New Jersey charters; and been driven by the decisions of Illinois, and the courts of last resorts in most of the other States, *to abandon their original plans which showed a trust, and combination and pool*, UPON THEIR FACE.

Upon this review of the facts, the law and the authorities, there can be no doubt that the association of the defendant in error was void at common law, because in restraint of trade, and tending to a monopoly; was void under the Federal statutes, and was in violation of the statutes of the State of Illinois.

## II.

FOREIGN CORPORATIONS DOING BUSINESS IN ILLINOIS ARE SUBJECT TO THE SAME LIABILITIES, RESTRICTIONS AND DUTIES AS DOMESTIC CORPORATIONS, AND CANNOT EXERCISE GREATER POWER, OR ENFORCE RIGHTS, ALTHOUGH WITHIN CHARTER POWERS, WHICH WERE NOT GRANTED BY THE LAWS OF THIS STATE TO SIMILAR CORPORATIONS. THE UNION SEWER PIPE COMPANY, DEFENDANT IN ERROR, IS A FOREIGN CORPORATION DOING BUSINESS IN ILLINOIS AND AMENABLE TO THE STATUTES OF ILLINOIS.

*a.* Comity between States does not require a law of one State to be executed in another State when it would be against the public policy of the latter State.

*b.* It is now settled that corporations are persons within the meaning of the Constitution and the statutes of the States.

*c.* Corporations created within the State are amenable to the police powers of the State to the same extent as natural persons.

The above propositions are supported by statute, and numerous decisions, in this State and other States. The question naturally arises: Could an Illinois citizen defeat our laws as the Union Sewer Pipe Company is attempting to do in this case? We say, unhesitatingly no. The Illinois anti-trust statute has been enforced repeatedly in this State against the citizens of this State. This statute was enforced and its validity declared in *Ford vs. Chicago Milk Shippers Assn.*, 155 Ill., 166; *Bishop vs. American Preservers Co.*, 157 Ill., 284; and quite recently (and about a month previous to the decision in the case at bar) in *Harding vs. American Glucose Company*, 182 Ill., 551.

The defendant in error is a citizen of Ohio and is suing upon a contract made with citizens of Illinois. (For contract see Rec., p. 566; Trans., p. 176.) In pursuance of said contract defendant in error shipped cars of pipe from Ohio to Illinois and is claiming a settlement from William E. Dee for pipe shipped under said contract, and from Thomas Connelly for notes given in pursuance of the said contract for pipe shipped, which notes are dated Chicago, Illinois (Rec., p. 100; Trans., p. 56), and therefore the laws of the State of Illinois are the laws applicable to the contracts sued on, and the defendant in error is amenable to the laws of the State of Illinois and subject to the same liabilities, restrictions and duties as domestic corporations, and if a domestic corporation cannot enforce the rights it is seeking to enforce, the defendant in error has certainly no standing in court to enforce its alleged rights.

In support of above proposition we cite the following authorities:

Section 26 of the Act concerning corporations (1 Starr & Curtis Stat., p. 1017) provides that: "Foreign corporations, and the officers and agents thereof, doing business in this State, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, *and shall have no other or greater powers.* And no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate, in this State, except as provided for in this Act."

In the *Farmers Loan and Trust Company vs. The Lake Street Elevated Railroad Company et al.*, 173 Ill., p. 439, this court after quoting said Section 26, on page 451, refers to the fact that the appellant in that case was organized in

New York for the purpose of accepting trusts, and for other purposes; and then refers to the provisions of the Illinois statutes regulating trusts, and holds that by virtue of said Section 26 the position of the appellant was the same as that of a domestic corporation. And on page 455 this court say:

> "In *Stevens vs. Pratt*, 102 Ill., p. 206, it was held that the purpose of Section 26 of the general incorporation Act, as above quoted, was to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character *and bring them all under the influence of the same law*. In *Pennsylvania Insurance Co. vs. Bauerle*, 143 Ill., p. 459, it was held that under a devise to the Pennsylvania Company, and to certain other parties, as trustees, the Pennsylvania Company had no power to act in this State as such trustee without compliance with the statute in question, which requires a deposit of $200,000 in stocks or other securities, etc."

And in *Rhodes et al., vs. The Missouri Savings & Loan Company*, 173 Ill., p. 621, after quoting said Section 26, this court, on page 628, say:

> "It will be seen that under the statutes, and under the general rule of comity existing between States, we will allow to foreign corporations a standing in our courts to enforce the *valid* contracts they may have made with our citizens, and all *valid* liens against property situated in this State. But that rule of comity does *not* require that we should allow foreign corporations to enforce contracts here if such enforcement would be in conflict with our law, and, being thus in conflict, the enforcement whereof would work against our own citizens and give to the citizens of another State an advantage which the resident has not." (*Walters vs. Whitlock*, 9 Fla., p. 86.)

As has been said by this court in *Pope vs. Hanke*, 155 Ill., p. 617 (on p. 928):

"*Comity between different States does not require a law of one State to be executed in another when it would be against the public policy of the latter State.* NO STATE IS BOUND TO RECOGNIZE OR ENFORCE CONTRACTS WHICH ARE INJURIOUS TO THE WELFARE OF ITS PEOPLE, OR WHICH ARE IN VIOLATION OF ITS OWN LAW." Citing Storey on Conflict of Laws, Sec. 527: *Faulkner vs. Hymen*, 142 Mass., p. 53; *Hill vs. Spear*, 50 N. H., p. 253; *Fisher vs. Lord*, 63 *Id.*, p. 514.

This court upon further references to statutes and authorities, held that the foreign corporation, in that case, could not exercise greater power or enforce rights, although within its charter powers, which were not granted by the laws of this State to similar corporations.

In *Pope vs. Hanke*, 155 Ill., p. 167, this court, after concluding that the note sued on was valid and enforceable by an innocent purchaser in Missouri where the note was made, say, on page 27:

"This being so, can a recovery be had in this State upon the notes here sued upon? The *general rule* is, that the validity of a contract is to be governed by the law of the State where it is made (*Phinney vs. Baldwin*, 16 Ill., p. 106; *Mumford vs. Kanty*, 50 Ill., 370), and in the application of this principle to notes, *it is held that the laws of the State where a note is made will govern as to the defenses which can be set up against a recovery thereon.*"

*Evans vs. Anderson*, 78 Ill., 558.

"While it is true, however, that one State or nation will recognize and execute the laws of another through comity, yet *the principle of comity does not permit the enforcement of foreign laws, which are prejudicial to the interests of the State where they are sought to be enforced.* A CONTRACT MADE IN ONE STATE WILL NOT BE ENFORCED IN ANOTHER, WHEN TO DO SO WOULD CONTRAVENE THE CRIMINAL LAWS OF THE LATTER

STATE, OR WOULD BE AGAINST THE EXPRESS PROHIBITION OF ITS LAWS. **Comity between different States does not require a law of one State to be executed in another when it would be against the public policy of the latter State. No State is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own law."**

This court then cites *Mumford vs. Canty, supra*, and other authorities, in support of the above text, and then examines the Illinois statutes and Illinois decisions, and holds that under them the note in question was not enforceable even in the hands of an innocent purchaser, and that our law was the one that should govern, and not that of Missouri, and "that comity does not require us to ignore "the statute of Illinois, under which these notes are void "even in the hands of an innocent purchaser, in order to "permit a defense which would be allowed under the law "of a foreign State. The enforcement of such foreign law "would contravene the criminal code of this State, *and* "*would be in opposition to its public policy*, and to the ex- "press prohibition of its statutory enactments, *and would be* "*prejudicial to the interests of its people*."

In *Clark vs. Central R. & B. Co.*, 50 Fed. Rep., 338, *held:* Comity between States will not authorize foreign a corporation to exercise powers within the State which a domestic corporation would not be permitted to exercise under the constitution and policy of the State.

See authorities cited under Point 2 *a*, 2 *b*, 2 *c*.

## III.

THE ILLINOIS ANTI-TRUST LAW OF 1891, AND THE AMENDATORY ACT OF 1893, IS CONSTITUTIONAL.

The contrary was held in this case:

1. The court held that Section 9 of the Illinois Anti-Trust Law of 1893, which provides that "the provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser," taints the whole Act and renders it void as class and special legislation in contravention of the Federal and State Constitutions.

2. The court denies its power to hold other Sections of the Act valid, because to do so would make the Act binding upon a class of persons in the State which the Legislature had specially exempted from its provisions.

The objection urged to this statute is that because one section exempts "agricultural products or live stock while in the hands of the producer or raiser" it is special and class legislation.

It has been held so often that a classification which is natural and not arbitrary is a proper one to be legislated upon, that authority seems hardly necessary. Yet this is the point upon which this case was decided in the court below. The latest expression of the Supreme Court of this State is that of *Lasher vs. People*, 183 Ill., 231.

"The Legislature have the power to form classes for the purpose of police legislation, if they do not arbitrarily discriminate between persons in substantially the same situation."

As to the Act of 1891, it is sufficient to reply that the Supreme Court of Illinois held it constitutional, by its holdings that the trial court properly refused to hold as law the propositions submitted, in *Ford et al., vs. The Milk Shippers' Association*, 155 Ill., 166. The proposition submitted in said case being the same as in the case at bar.

And recently in the case of *Harding vs. American Glucose Co.*, 182 Ill., 551, the constitutionality of the same law as amended by the law of 1893, and again amended in 1897, was challenged by one of the most powerful corporations, but it was unable to point out any defect in the law and the Supreme Court upheld its validity.

The undoubted rule is, that the decision of a State court of last resort as to the constitutionality of a State law is binding on State courts and the courts of the United States. When that decision has been rendered, all that remains for the Federal Courts which may be called upon to administer the statute, is to determine whether it is consonant with the Constitution of the United States, and if it is, to enforce it. Now, in deciding that the Illinois Anti-Trust Law is in conflict with the Constitution of the State of Illinois, the judge below overruled the Illinois Supreme Court, and in holding it inconsistent with the 14th Amendment to the Constitution of the United States he overruled the Supreme Court of the United States.

The two decisions cited above are conclusive as to its conflict with the Constitution of the State of Illinois. As to the Federal Constitutional provision,

The 14th Amendment to the United States Constitution "is not designated to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good

order of the people." (*Barbier vs. Connelly*, 113 U. S., 27). Applying that principle, it was held that the 14th Amendment did not prevent the city of San Francisco from forbidding the operation of laundries between the hours of 10 o'clock P. M. and 6 A. M. within certain prescribed limits of the city. The people who wanted to run their laundries between those hours and within those limits thought that they were deprived of the equal protection of the laws in being subjected to penalties not visited upon other laundrymen operating in other districts of the city at all hours of the day and night, and therefore invoked the protection of the 14th Amendment. But the Supreme Court of the United States thought otherwise. "It would be an extraordinary usurpation of the authority of a Municipality," said Justice Field, "if a Federal tribunal should undertake to supervise such regulations. * * * The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced. * * * There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. * * * It is not legislation discriminating against any one. All persons engaged in the same business within the prescribed limits are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions." The distinction is made so clear by Judge Field that a volume of decisions could not make it clearer. The first section of the 14th Amendment was intended to forbid the enactment of laws which would bear unequally on different individuals in the same situation, measuring its rewards and penalties, not according to the nature of the Act, but according to the person who does

it. In the case at bar, the Union Sewer Pipe Company, by going into farming and stock raising, can escape the penalties of the Illinois Anti-Trust Law, and farmers and stock raisers who corner the sewer-pipe market will find themselves succeeding to the pains and penalties which the law denounces against the trusts.

**This section is not a discrimination in "persons." It is a discrimination in "things," and gives to every person an unrestricted right to engage in handling the same "things."** There is no invidious discrimination against any corporations or persons.

The objection that this is class legislation has no force. As said by the Supreme Court of the United States in *Soon Huig vs. Crowley*, 113 U. S., 705:

> "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discriminations can be said to impair that equal right which all can claim in the enforcement of the laws."

And again in *Barbier vs. Connelly*, 113 U. S. 27:

> "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated is not within the Amendment."

"Section 6 of the Act of 1889, providing that no officer or seaman, of a sea-going vessel or ship shall be arrested or imprisoned for debt, etc., is not in conflict with Section 20 of the Bill of Rights, which provides that no law shall be enacted granting to any citizen or class of citizens any

privilege or immunity which upon the same terms shall not equally belong to all citizens."

Re. Fred. Oberg, Oregon, Supreme Court. 14 L. R. A., 577.

The immunity here granted, if any, is immunity from arrest from debt. Any person who is a sailor may enjoy this immunity, and any citizen desiring to injoy such immunity may have it in the words of the constitution "upon the same terms" by becoming a sailor. This belongs to that class of exceptions that are made in all States to certain classes of persons, not so much for the benefit of the persons themselves, as for the benefit of the community which needs their services.

I quote from the decision of the Kentucky Court of Appeals in *Louisville Safety Vault Co. vs. L. & N. Ry. Co.*, 14 L. R. A., 584:

> "It is well settled that a corporation is 'a person' within the meaning of the Fourteenth Amendment to the United States Constitution; that it is entitled to the equal protection of the laws; and that no State can to any extent deny it. *Santa Clara County vs. Southern Pac. R. R. Co.*, 118 U. S., 396 (and citing other decisions). But this constitutional provision does not affect the police power of the State, which is to be exercised for the protection and safety of its citizens. It was not the purpose of the Constitution to disarm the State of the power to guard the public safety * * * It will be noticed, however, that the statute in question does not give a right of action merely against railroad corporation, but it applies to each proprietor of a railroad, whether operated by an individual, partnership, or corporation. It applies not merely to corporations operating railroads, but to all persons operating them."

It is the undoubted rule that State legislation is not ob-

noxious to the Fourteenth Amendment of the Constitution of the United States, if all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed.

*Missouri Pac. Ry. Co. vs. Mackey*, 127 U. S., 209.

And cases cited under Point III.

I submit that, *upon principle*, there exists, in present civilization, and in the present state of affairs in this country, sound reasons in favor of making such statutes not applicable to agricultural products or live stock, while in the hands of the producer or raiser.

Anti-trust statutes are enacted in recognition of the fact that *the resistless drift and trend of the present times is toward combinations and centralization of money and the money power; toward the creation and perpetuation of a few billionaires.* RESULTING IN DRIVING, NOT ONLY THE POORER CLASSES TOWARD GREATER POVERTY, **but in driving the great middle class of enterprising and independent citizens, the hope of every country and especially the hope of every republic, into positions of dependency upon such billionaires, thus converting the entire country into a number of billionaires on one hand, and their employees and dependants, on the other, and thus discouraging and defeating individual ambition and individual independence and enterprise, in every direction.**

One necessary effect of this recognized *trend* is that the producers of agricultural products and raisers of live stock are being pushed more and more toward positions of dependency, tenantry and employees. To counteract this, so far as can be done reasonably, is clearly the duty af every

legislature; one method of counteracting it is to permit co-operation, and, if need be, combinations, *by everybody* in the protection of agriculturalists and stock-raisers, while their products remain in their hands.

This statute does not merely permit the agriculturalists and stockholders to co-operate but permits *everybody* so to do. If the statute permitted agriculturalists and stockholders to do all the acts prohibited in the statute, then, indeed, a serious question would be presented as to the constitutionality of the statute. But this is not what the statute attempts.

In short, these statutes of Illinois are enacted in recognition of the need of legislative restraints against the inevitable trend of the times toward and in favor of money and the money power; AND IN FURTHER RECOGNITION OF THE FACT THAT SUCH TREND, INSTEAD OF BEING IN FAVOR OF AGRICULTURAL PRODUCTS AND LIVE STOCK IN THE HANDS OF THE PRODUCER OR RAISER, **is against them, and, therefore, needs no restraint in that direction, but, if anything, needs encouragement.**

It is submitted that these *alleged* discriminations, in these statutes, are well founded and reasonable, and exist *in principle*, in the present state of modern civilization, and are, therefore, *not* special legislation, or otherwise open to objection on constitutional grounds.

## IV.

BECAUSE ONE SECTION OF THE STATUTE IS UNCONSTITUTIONAL, IT DOES NOT FOLLOW THAT THE OTHER SECTIONS OF THE SAME ACT, WHICH ARE WITHIN THE POWER GIVEN BY THE CONSTITUTION, SHOULD NOT BE ENFORCED. EVERY PRESUMPTION IS IN FAVOR OF THE CONSTITUTIONALITY OF A LEGISLATIVE ENACTMENT.

Assuming for the purposes of this decision that Section 9 of the Act of 1893, referred to herein, is unconstitutional, and, therefore, void, it does not follow that the whole act falls to the ground. The objection urged against Section 9 of the Act of 1893, is not urged against any other section of the said Act. Section 9 may be eliminated from the Act, and the residue of the Act be readily, properly and intelligently enforced, and the settled law is, that when constitutional and unconstitutional provisions in a statute are distinct and seperable, the valid provisions may stand as though the invalid provisions had not been introduced therein. Plaintiffs' in error cases are in no way founded on or connected with said Section 9 of the Act of 1893.

If the defendant in error is a trust in violation of Sections 1 of the Act of 1891, and the Amendatory Act of 1893, then the only other section of said Act concerned in Section 6 of the Act of 1891, exempting purchasers of commodities produced or manufactured in violation of the said Act from payment, which was reinacted in Section 10 in the Amendatory Act of 1893.

Section 9 of the Act of 1893, would have no application to the case at bar, as it is in no way invoked or relied on by the plaintiffs' in error.

In support of this proposition, see authorities cited under "Point IV," *supra*.

Pursuing the same argument: The Act of 1893, was amendatory and supplemental to the Act of 1891, by adding to it two new sections and reinacting the others without any clause repealing the law of 1891. It follows that if the entire amendment was declared unconstitutional, the Act of 1891, would still be in force, and the *said Act of 1891 contains the two sections (1 and 10) upon which the defense in the suit at bar is based.*

It is also submitted that when an act is done under the provisions of a statute, some of which are void and others valid, it will be presumed to have been done without reference to the void or unconstitutional provisions, unless there is something clearly indicating to the contrary. The courts will not only uphold a statute as far as it is possible to be done without violence to the constitution, but will also uphold whatever has been done under or in pursuance of said statute, so far as the acts done appeared to be within the provisions of the valid portions of the statute.

Where the unobjectionable portion is distinct and complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of the portion which is invalid, the former will be upheld.

For authorities in support of above propositions see those cited under "Point IV," "*a*," *supra*.

The unconstitutionality of a statute must be clear and manifest before a court should declare it, so that where any reasonable doubt exists as to its constitutionality, it should be upheld.

Invalidity must be plain—United States.

*Cooper vs. Telfair*, 4 Dall. (U. S.), 18,

And numerous State decisions cited in foot note, page 1085, Volume 6, American and English Encyclopedia of Law.

The law now on the statute books protects the great and growing commerce of this State. Under these circumstances courts should hesitate to pronounce a law unconstitutional, but should solve every reasonable doubt in favor of its validity, and that is what the authorities require.

Cooley Const. Limit, 182.

See also on this point, authorities cited under "Point IV," "*b*," *supra*.

In conclusion of my argument on the constitutionality of these statutes, I reiterate *that these statutes have already been declared constitutional by the Supreme Court of the State of Illinois;* that they have been attacked on all sides and proved invulnerable. I do not know that anything need be added to this statement. Its truth cannot be disputed, and the validity of the decision in this case is not therefore, debatable. Nothing can detract one iota from the binding force of the decisions of the courts of Illinois.

## V.

FEDERAL COURTS—STATE LAWS AND RULES OF DECISION—DECISIONS BINDING.

Where the Legislature has indicated a policy of the State that is the rule for the courts. In the State of Illinois the Legislature has declared its policy by the Anti-Trust and Anti-Monopoly Statutes. It is for the court to construe

these statutes as applicable to the case at bar and give effect thereto.

For a decision illustrating both sides of the binding force of State laws as rule of decision in Federal Courts I could not cite a better authority than *Burgess vs. Seligman*, 107 U. S., 33, Supreme Court, p. 10. The Supreme Court declared as follows:

> "The Federal Courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules or property *and action in the State, and have all the effect of law, and which it would be wrong to disturb.* This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence.
>
> (NOTE. The law is settled in this State by the decisions in *Ford vs. Milk Shippers' Association*, 155 Ill., 166, and *Harding vs. American Glucose Co.*, 182 Ill., 551.")

## VI.

### EXERCISE OF THE POWER OF ANNULMENT.

A question involving the constitutionality of a statute should be determined only when it is impossible to dispose of a cause on its merits otherwise, and a court will be especially reluctant to investigate or determine the constitutionality of a statute on preliminary motions.

*Ex. P. vs. Randolph*, 2 Brock (U. S.) 447.

See also foot-notes of decisions of statutes on this question on page 1084, Vol. VI., Am. and Eng. Ency. of Law.

There were other questions involved in the trial of this case below, for instance there was a claim of set-off for breach of contract arising out of the subject-matters of the suit (which I present under a different argument VII *infra*) which was clearly a matter for the consideration of the jury, but this was disregarded entirely, and the graver question passed on, and a statute declared unconstitutional which had already been declared valid by the Supreme Court of the State that passed it.

## VII.

### OTHER QUESTIONS INVOLVED.

*Set-off and counter claims of plaintiffs in error stricken out on motion, and relied on as grounds of reversal in this case. Assignments of error XII and XIII.*

The plaintiffs in error were large dealers in sewer pipe in the city of Chicago, handling almost exclusively the commodity known as Standard Akron Pipe in their business, and for that reason dependent upon the Akron manufacturers for their supply of pipe (Trans., pp. 172-173-141;

Rec., pp. 561-562-488.) In fact Standard Akron Pipe was used exclusively by the city of Chicago in public sewers from about 1873 until 1896 (Trans., p. 141; Rec., p. 488.) and both plaintiffs in error were engaged in the business of supplying the city of Chicago with this grade of pipe for public sewers. At the time of the formation of the Union Sewer Pipe Company, William E. Dee had entered into a contract with Camp & Thompson, one of the constituent members of the Union Sewer Pipe Company to purchase 308 carloads of pipe for to supply contracts the said Dee had already entered into (Trans., p. 141; Rec., p. 488), and Thomas Connelly being under like obligations to supply pipe entered into a similar contract with the same parties to purchase 200 carloads of the said Standard Akron pipe (Trans., p. 179; Rec., p. 570.) Both contracts were assumed by the Union Sewer Pipe Company after Camp & Thompson entered into agreement and subsequently carried out at an increase of 5 per cent. over the contract price (Trans., p. 152.) Plaintiffs in error attempted to prove this on the trial of the case for the purpose of recouping damages to the extent of the said over-charge, but the court would not allow them to do so. (Trans., pp. 143-144-145; Rec., pp. 490-491-492.) The court subsequently admitted this evidence solely for the purpose of showing whether or not the defendant in error was a monopoly, and for no other purpose. (Trans., pp. 146-150; also Trans., p. 176; Rec., p. 560.) (As to rulings of court along same lines in case of Thomas Connelly, see Trans., pp. 178-179-180-181; Rec., pp.570-571-572-573.)

In theThomas Connelly claim for set-off the defendant in error at one time offered him $2.000 in settlement of the claim against the defendant in error, which he refused.

claiming the full amount of his damages (Trans., pp. 180-181; Rec., p. 573.)

In this set-off, if testimony was allowed to be given, William E. Dee would show actual damages sustained by breach of this contract, made up of the overcharge of 5 per cent. on 308 car loads of pipe, of $28 per car, or in all $8,624, and Thomas Connelly would show like damages arising in the same way amounting in all to $5,600, both amounts being largely in excess of the amounts claimed from them by the defendant in error, and for which defendant in error recovered judgment.

Witnesses produced and sworn for the defendant in error testified concerning these transactions. See testimony of Harry Thompson (Trans., p. 125; Rec., p. 360), Horace B. Camp (Trans., pp. 99-116; Rec., p. 236), E. M. Buell (Trans., p. 125; Rec., p. 360).

In addition to this there was the general claim for damages under the Act of Congress known as the Sherman Act, and which the court ruled in the *United States vs. Addyston Pipe & Steel Co.* (Vol. 85, Federal Rep., 273), created a right of civil action for damages in favor of persons injured by restraints of trade, such as appears in this case. The effect of the contract in this case was to restrain trade. As E. M. Buell says in his testimony (Trans., p. 125): "It shut off all competition from the Akron district." It raised the prices of sewer pipe 5 per cent. on all pipe shipped from the Akron district for three years, which additional and fictitious price the plaintiffs in error were compelled to pay, as the direct and inevitable cause of the combination known as the Union Sewer Pipe Company. Why, then, could they not recoup this amount in

damages in a cause of action arising out of and being connected with the subject-matter of the suit?

In the case at bar the court, on motion, struck out all notices of set-off and counter claim of plaintiffs in error although the same were legitimate subjects of set-off and counter claim. (Trans., p. 49; Rec., p. 86.)

Where the defendant in an action on a contract seeks to recoup damages arising from the plaintiffs' breach of the contract, it is immaterial that the damages alleged by the defendant are unliquidated.

*Harlan vs. St. Paul, etc., Ry.*, 31 Minn., 427, and cases cited under "a," "Point VII.," *supra*.

On the trial of an action in which a set-off or counter claim has been pleaded, the case stands as though two separate suits were brought to determine the rights of the parties, and in reality two suits are pending before the court to be tried at the same time!

*Merchants Bank vs. Schulenberg*, 54 Mich., 49.

See, also,

Point "b," "VII.," *supra*.

Where a counter claim pleaded by the defendant and the plaintiffs reply thereto raises issues of fact, these issues should be tried by a jury, and a motion by the plaintiff for judgment on the pleadings should be refused.

*Wilson vs. Hughes*, 94 N. Car., 182.

[NOTE.—*The motion was granted in the case at bar.*]

## VIII.

AMENDMENT OF PLEADINGS WHEN NECESSARY TO PRESENT AN ISSUE ON THE MERITS, NOT DISCRETIONARY, BUT A LEGAL RIGHT.

The court erred in not permitting plaintiffs in error to amend their notices of set-off and defenses attached to plea of general issue—assignment of error III.

The plaintiffs in error offered to file an amended notice of set-off which the court would not permit (Trans., p. 51; Rec., pp. 91-92-93-94), which amended notice of set-off is set out fully in assignment of error III. herein. See also (Trans., pp. 242-243; Rec., p. 702.)

The statute of "*amendments and jeofails*" of the State of Illinois, is found on page 144 of the Revised Statutes, and was enacted especially to cover such cases as this. Section 1 of said statute reads as follows:

> "Power of the court to permit amendments. That the court in which an action is pending shall have power to permit amendments in any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as may be just, at any time before judgment rendered therein."

The application here was made before the trial of the case (Trans., p. 51; Rec., p. 91.) and was in furtherance of justice, as everything in the amendment offered to be filed showed a substantial matter of defense and a legitimate and proper subject of set-off and counter-claim.

Answer containing demand for affirmative relief by way of set-off or counter-claim are amendable. The same is true of pleas in recoupment, notices of set-off or recoupment accompanying the general issue.

*Fontaine vs. Bayley*, 90 Ga., 416.
And cases cited under Point VIII, *supra*.

Under Illinois statute, court should allow all formal and technical objections to be obviated by amendment.

*Drake vs. Drake*, 83 Ill., 526.

Not to allow any formal amendment bringing merits before the court is abuse of discretion.

*Shufeldt vs. Fidelity Bank*, 93 Ill., 597.
*Kirkpatrick vs. Cooper*, 77 Ill., 565.

Leave to amend pleadings when necessary to present an issue on the merits, not discretionary, but a legal right. "Just and reasonable terms" mean such terms as were reasonably required at common law.

*Empire Co. vs. Trust Co.*, 1 Ill. App., 391.

## IX.

THE PLAINTIFF IN ERROR, WILLIAM E. DEE, SEPARATELY ASSIGNS AS ERROR THAT THE COURT ERRED IN PERMITTING PROOF OF INDEBTEDNESS FROM SAID DEE TO THE UNION SEWER PIPE COMPANY AFTER THE DEFENDANT IN ERROR HAD CLOSED ITS TESTIMONY AND DURING REBUTTAL.

After all the testimony was in for defendant in error the court allowed it to prove its account against William E. Dee, which was a part of its direct case, and should have been done on direct examination.

(Trans., p. 223; Rec., p. 666.)

## X.

### OTHER QUESTIONS INVOLVED IN ASSIGNMENT OF ERRORS AND NOT SPECIFICALLY ARGUED.

Each of the errors assigned is relied upon as a ground of reversal, and any errors not specifically argued here are covered in the argument of other errors. For instance, the exclusion of the deposition of the Attorney-General of the State of Ohio ("Point X") as to the defendant being a trust under the laws of Ohio, and admissions made by its officers (Rec., pp. 431 to 435,) goes to the question of the defendant in error being a combination in restraint of trade, and if the statute of Illinois is valid ("Point III"), the same would be competent evidence; if not, the testimony would avail nothing. I ask the consideration of this question by the court with other questions involved.

## XI.

### IN CONCLUSION OF ARGUMENT.

Permit me to say in conclusion, that the acts and facts and circumstances disclosed in this case *show a deliberate and wilful and intentional violation of every one of our statutory provisions* by every member of the Union Sewer Pipe Company, defendant in error, jointly and severally, *for all and every of the very purposes expressly prohibited and declared illegal and criminal by such statutes.* The evidence shows how and why that the necessary effect and deliberate purpose and intent of all those instrumental in organizing the Union Sewer Pipe Company, in doing it, was to accomplish and bring about absolute control of prices of standard Akron sewer pipe, and control of sup-

plies, etc., in violation of every single provision of the statutes of Illinois and the Federal statutes.

Compare the contract between the Union Sewer Pipe Company and its constituent companies (Trans., p. 128; Rec. , p. 397), with that declared in restraint of trade in *United States vs. Addyston Pipe & Steel Co.* (Vol. 85, Fed. Rep. 271), and the latter is not as binding and restraining as the former; besides, the monopoly was not by any means as complete.

All this was practically admitted by counsel for defendant in error on trial of case in court below (See argument of counsel, Trans., p. 144), but it is and will be contended, that notwithstanding all that, that plaintiffs in error cannot set up a defense on the grounds of public policy, or to enforce the laws of the State.

It is not true that the plaintiffs in error are seeking merely to enforce *public rights* or to enforce a criminal statute. They have *vested property rights*, which were damaged and affected directly and against their objections by the acts complained of. Plaintiffs in error have been directly damaged by the failure of defendant in error to carry out a contract—William E. Dee to the amount of $8,624, and Thomas Connelly to the amount of $5,600—and also as the direct and proximate result of the combination of the defendant in error as a trust, pool and combination, in violation of the statutes of Illinois and the United States, has suffered other damages by being compelled to pay an increased price for their goods, largely in excess of their real market value, for upward of two years. Therefore, these plaintiffs in error are not here seeking to enforce public rights, or seeking to punish criminals, but they are here seeking ONLY *to protect and enforce their rights*, and,

*in doing so*, THEY HAVE THE RIGHT TO RELY ON AND CLAIM THE BENEFIT OF THE ENTIRE BODY OF THE COMMON LAW, AND EVERY STATUTE APPLICABLE, IN WHOLE OR IN PART, TO THE FACTS AND CIRCUMSTANCES DISCLOSED.

Plaintiffs in error were not permitted to make any defense, outside of to show the defendant in error to be a monopoly in restraint of trade. This they did. All their other matters of defense were excluded; and it should not be forgotten that there was no finding of a single fact set up by plaintiffs in error in their special defenses against them, by the trial court, or any attempt by that court to consider or find the facts, or allow the jury to do so. *The court simply found the statute upon which the defenses of the plaintiffs in error was founded to be unconstitutional*, sweeping away the defenses, and refused to consider other matters of substantial defense on the merits of the case.

The issue involved here is one which goes to the very foundation of government. If corporations, creatures of the Legislature, have arrived at such a state of power and superiority to the law that they cannot be controlled and cannot be restrained and reached in any natural or reasonable way by legislative enactment, it is high time that such fact be ascertained. The framers of the Constitution and the people who have lived under the Constitution never expected or intended that its provisions should be a shield and protection to great public wrongs and oppressions. No greater service can be rendered to the State of Illinois than to treat this anti-trust law according to its spirit and intent, and to hold that all corporations within the borders of and doing business in this State are subject to its control and regulation.

Upon this argument of the facts and the review of the law and authorities, I respectfully submit that the judgment of the court below should be reversed, and that such direction be given that full force and efficiency may inure to the plaintiffs in error, and each of them, by reason of the defenses set up in their special notices of defenses, and in their notices of set-offs attached to and filed with their pleas in this cause and all amendments to such notices.

Respectfully submitted,

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